# Response to the Law Commission of England and Wales Consultation on the Review of the Arbitration Act 1996

## (December 2022)

This response is provided by a working group of the Centre for Commercial Law and Centre for Private International Law at the University of Aberdeen. The working group is coordinated by Dr Gloria M Alvarez, FCIArb and Dr Nevena Jevremovic and consists of Dr Patricia Zivkovic, Rahul Donde, Qusai Alshawan, Ilias Kazeem, Helen Ibiere Jumbo, Baffour Yiadom-Boakye, Aysu Baser, and Konstantina Kalaitsoglou with comments from Professor Justin Borg Barthet, Dr Burcu Yüksel Ripley, and Professor Derek P Auchie.[1]

[11] The Dispute Resolution Network is a professional network with further expertise, established by the University of Aberdeen, School of Law. More information can be found here: https://www.abdn.ac.uk/law/research/dispute-resolution-professional-network-1221.php

UNIVERSITY OF ABERDEEN

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## I. EXECUTIVE SUMMARY

The School of Law at the University of Aberdeen is thankful for the opportunity to respond to the Law Commission's extensive and clear review of the Arbitration Act 1996. We note that, while the Arbitration Act 1996 extends to England, Wales and Northern Ireland, the Act is of utmost importance in Scotland given the ample number of stakeholders and industry users who choose London as seat of arbitral proceedings. It is in this sense of plurality, we consider this contribution can provide intra-UK perspectives to the domestic and international approach the Consultation already presents.

In Chapter 2, we agree that the Arbitration Act 1996 should not include a provision dealing with confidentiality and this is best addressed by the courts on a case-by-case basis. In Chapter 3, we propose that the standards of independence and impartiality are complementary standards. We agree that prescribing the state of knowledge required of an arbitrator's duty of disclosure under the Arbitration Act 1996 would prevent late and trivial challenges.

In Chapter 3, we are of the view that the Arbitration Act 1996 should provide equal statutory treatment for both the duty of independence and impartiality, notwithstanding the differences in practical implications. We are further of the view that the arbitrators should have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their independence and impartiality. We agree that the Arbitration Act 1996 should specify the state of knowledge required of an arbitrator's duty, and that such duty should be based upon what an arbitrator ought to know after making reasonable inquiries.

In Chapter 4, in respect of protected characteristics in an arbitrator, we consider these should be enforceable only if necessary. In Chapter 5, we agree that arbitrators should be held liable for resignation, unless they prove that the resignation was reasonable and such resignation could be reasonable due to *force majeure* and other circumstances which are beyond the control of an arbitrator. Arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration, such as applications to remove an arbitrator; we consider the language of section 29 of the Arbitration Act 1996, as currently articulated, to be broad enough to protect an arbitrator against costs of court proceedings.

In Chapter 6, about summary disposal, we agree that the Arbitration Act 1996 should make provision for early determination, but the terminology to be employed should be 'early determination' or 'early disposition' rather than 'summary disposition' or 'summary determination'. The procedure to be adopted should be determined by the tribunal in consultation with the parties and having regard to the circumstances of each case. The threshold for an application for early determination/disposition should be manifest lack of merit without other compelling reason for full merits hearing. Tribunals should be empowered to assess the costs.

In Chapter 7, we recognise the need for section 44 to confirm that orders made under its authority can be made against third parties, adding further strength in the role of domestic courts to support arbitration proceedings. We also agree with the further amendments to section 44 to ensure that consent to an appeal should only apply to parties to the arbitration process. On the question of Arbitration Act 1996 and emergency arbitrators, we highlight that orders rendered either by the established tribunal or the emergency arbitrators serve an identical purpose, which is the assessment of parties' positions on law and fact and require enforceability.

In Chapter 8, we agree on the importance of clarifying the effects of section 67 in order to protect the principles of fairness and finality, as well underscoring the importance of aligning the Arbitration Act 1996 with the objectives of the New York Convention.

In Chapter 9, we answer that an appeal on a point of law should be an opt-in mechanism for international arbitrations and an opt-out mechanism for domestic arbitration.

In Chapter 10, we agree that the doctrine of separability should be mandatory, as well as underscoring the importance of clear requests for sections 32 and 45. We also agree with the proposal that the Arbitration Act 1996 should make explicit mention of remote hearings. We also deal with section 39 question to clarify the difference between award and orders. In terms of remedies, we also agree that section 39(1) should be amended to refer to remedies.

Lastly, in Chapter 11, we considered the other points for reform should include third-party funding and an expansion of the tribunal's power. The latter includes the tribunal's power to amend statements for closely related new issues and the power to decide whether to use remote hearings.

## II. ABBREVIATIONS

| | |
|---|---|
| Article | Art. |
| Articles | Arts. |
| England and Wales | E&W |
| et cetera | etc. |
| Euro | EUR |
| exempli gratia | e.g. |
| ibidem | Ibid. |
| id est | i.e. |
| paragraph | para |
| paragraphs | paras |
| United Kingdom | UK |
| United States of America | US or USA |
| versus | v |

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|---|---|
| Arbitration Institute of the Stockholm Chamber of Commerce | SCC |
| Arbitration Rules of the SCC | SCC Rules |
| Convention for the Protection of Human Rights and Fundamental Freedoms | ECHR |
| The European Court of Human Rights | ECtHR |

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|---|---|
| Convention on the Settlement of Investment Disputes between States and Nationals of Other States | ICSID Convention |
| English Arbitration Act 1996 | Arbitration Act 1996 |
| HKIAC Administered Arbitration Rules | HKIAC Rules |
| Hong Kong International Arbitration Centre | HKIAC |
| IBA Guidelines on Conflicts of Interest in International Arbitration 2014 | IBA Guidelines 2014 |
| IBA Rules on the Taking of Evidence in International Arbitration | IBA Rules on Evidence |
| ICC Rules of Arbitration | ICC Rules |
| ICSID Institution Rules | ICSID Rules |
| International Centre for Settlement of Investment Disputes | ICSID |
| International Chamber of Commerce | ICC |
| Law Commission Consultation Paper 257, Review of the Arbitration Act 1996, September 2022 | Consultation Paper |
| LCIA Arbitration Rules | LCIA Rules |
| London Court of International Arbitration | LCIA |
| New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 | New York Convention |
| Swiss Rules of International Arbitration | Swiss Arbitration Rules |
| UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 | UNCITRAL Model Law |

## III. THE RESPONSES

# CHAPTER 2: Confidentiality

***Question 1***

***We provisionally conclude that the Arbitration Act 1996 should not include provisions dealing with confidentiality. We think that confidentiality in arbitration is best addressed by the courts. Do you agree?***

Yes, we agree. Codification of the law of confidentiality will infringe the level of party autonomy in arbitration and increase uncertainty. Parties are free to determine the procedure, including confidentiality aspects. The relevant court can deal with issues of confidentiality on case-by-case basis considering specific circumstances, making comprehensive statutory codification challenging and potentially leading to uncertainty in application. The Consultation Paper identifies the complexity of this issue and there are dangers inherent in trying to legislate in a complex area, especially given the international disparities. Although a default rule followed by robust exceptions could be developed, there is a danger that this will inject uncertainty in a flexible area where there are no major issues, and the correct interpretation of such provisions will take a long time to develop.

## CHAPTER 3: Arbitrator Independence and Disclosure

### *Question 2*

***We provisionally conclude that the Arbitration Act 1996 should not impose a duty of independence on arbitrators. Do you agree?***

No, we do not agree. Standards of independence and impartiality are complementary, and taken together, are essential for the integrity and legitimacy of arbitration. The Arbitration Act 1996 should provide equal statutory treatment for both, notwithstanding the differences in practical implications discussed in the Consultation Paper. This approach would align the Arbitration Act 1996 with international arbitral practice and prevent uncertainty and unnecessary challenges in the first place.[2] Moreover, as Lord Hodge clarified in *Halliburton,* independence is an implied term of the arbitrators' appointment contract that exists notwithstanding a statutory provision in the Arbitration Act 1996.[3] Such an important feature of the arbitral process should not be left to implication; instead it should be expressed. The lack of an express provision for independence led to the (in our view undesirable) need for the Supreme Court to have to define the law. The law in this area will need to be further clarified, and this process will be more certain if carried out against the background of an express legislative test rather than on a piecemeal basis in case law. Lastly, independence and impartiality are elements of the right to a fair trial under Art. 6 ECHR and Section 6(1) UK Human Rights Act, which courts in England and Wales must consider.[4]

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[2] In the context of international commercial arbitration, Art. (12)2 of the UNCITRAL Model Law imposes this element, which was adopted by many national arbitration laws.

[3] *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [76] (Lord Hodge). Lord Hodge commented: '*Those statutory duties give rise to an implied term in the contract between the arbitrator and the parties that the arbitrator will so act*.'

[4] *Beg S.P.A v Italy* App no 5312/11 (ECtHR, 20 May 2021). This case is an illustrative example of such approach. The case involved an arbitration carried out between a power generation company, and the State for the distribution of energy from a hydro-electric dam and generator being built in Albania. In this case, the arbitrator appointed to hear the proceedings was also acting as a lawyer, in a different set of arbitral proceedings, for the respondent company. Therefore, there was a clear conflict of interests, but the arbitrator failed to disclose that conflict. Despite this, after the commencements of proceedings in Italy to challenge the award made against them, all of the applicant's claims were dismissed by the Italian courts. Before the ECtHR, the respondent, Italy, asserted that Article 6(1) ECHR was not in fact engaged, on the basis that by electing to proceed to arbitration, the applicant had waived their right to a fair trial. The ECtHR rejected the argument, pointing out that the Italian state owed the applicant a duty under its national law to ensure a right to a fair trial, independence and impartiality of the arbitration proceedings in accordance with Italian arbitration law. The ECtHR ruled the Italian state owed the applicant a duty under its national law to ensure a right to a fair trial, independence and impartiality of the arbitration proceedings in accordance with Italian arbitration law. Ultimately, Italy was fined 15,000 EUR because of their failure to protect the applicant's Art. 6(1) right.

***Question 3***

***We provisionally propose that the Arbitration Act 1996 should provide that arbitrators have a continuing duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality. Do you agree?***

Yes, we agree. First, such an approach would bring the Arbitration Act 1996 into line with international arbitral practice. Second, it would recognise disclosure as an ongoing legal and contractual duty,[5] complementing the duty of independence and impartiality. Consequently, it would remedy the inequality of knowledge between the parties, paving the way for an informed exercise of the parties' right of waiver, as waiver could not occur when there is no disclosure.[6] Lastly, an ongoing duty to disclose is consistent with principles of natural justice.[7] Conversely, lack of ongoing disclosure would prompt further litigation concerning matters raised in *Halliburton* again, and would increase uncertainty, challenges, and breach 'an implied term' of disclosure under the contract of appointment. Again, the expression of a duty as important as this in legislation is, for certainty reasons, better than leaving this to the development of the common law.

***Question 4***

***Should the Arbitration Act 1996 specify the state of knowledge required of an arbitrator's duty of disclosure, and why?***

Yes, it should. Expressing the state of knowledge required of an arbitrator's duty of disclosure under the Arbitration Act 1996 would prevent late and trivial challenges, uncertainty and doubts regarding the arbitrator's impartiality and independence. Further, we propose that the duty of disclosure and state of knowledge should capture the pre-arbitrator appointment stage (i.e., the stage before the formation of the arbitrator's contract) to align with the reasoning in *Halliburton*.[8]

[5] *Halliburton case* [2020] UKSC 48, [75] – [76] (Lord Hodge).

[6] Ibid, [130] (Lord Hodge).

[7] See for example Lord Hope's reasoning concerning the principle of tribunal impartiality and independence in *Pinochet Ugarte (No.2)* [2000] 1 A.C. 119 [140] (Lord Hope).

[8] [2020] UKSC 48, [169] (Lord Hodge).

***Question 5***

***If the Arbitration Act 1996 were to specify the state of knowledge required of an arbitrator's duty of disclosure, should the duty be based upon an arbitrator's actual knowledge, or also upon what they ought to know after making reasonable inquiries, and why?***

The duty to specify knowledge should be based upon what an arbitrator ought to know after making reasonable inquiries. First, international arbitration practice, such as the IBA Guidelines 2014, supports a duty to make reasonable inquiries, as there might be situations in which an arbitrator is, , in the absence of such inquiries, unaware of links or connections with the participants in the arbitration. Th duty to make reasonable inquiries would further prevent any accidental absence of the arbitrator's actual knowledge which might lead to scenarios as seen in *Halliburton*'s case[9] and the case of *A v B*.[10] From the perspective of arbitrators' contracts of appointment, this would offer some protection to arbitrators from a claim by the parties under English contract law, as is now more likely following the *Halliburton* decision.

[9] [2020] UKSC 48, [39] (Lord Hodge).

[10] The courts clarified that the arbitrator's non-disclosure was accidental. *A and Others v B, X* [2011] EWHC 2345 (Comm), [70] (Mr Justice Flaux).

## CHAPTER 4: Discrimination

***Question 6***

***Do you think that the requirement of a protected characteristic in an arbitrator should be enforceable only if it is necessary (as suggested by the Court of Appeal in Hashwani v Jivraj) or if it can be more broadly justified (as suggested by the House of Lords)***?

We think that the requirement of a protected characteristic in an arbitrator should be enforceable only if it is necessary in the context of arbitration. Otherwise, it would lead to discriminatory effects that are not aligned with the nature of the quasi-judicial position of arbitrators, and the legitimate aim of arbitration to provide access to justice. The avoidance of discrimination is part of important public policy considerations in UK law and culture, (as demonstrated by the breadth and impact of the Equality Act 2010) as well as in many international legal cultures. We should take any step that can reinforce this important legal culture.

***Question 7***

***We provisionally propose that: (1) (2) the appointment of an arbitrator should not be susceptible to challenge on the basis of the arbitrator's protected characteristic(s); and any agreement between the parties in relation to the arbitrator's protected characteristic(s) should be unenforceable unless in the context of that arbitration, requiring the arbitrator to have that protected characteristic is a proportionate means of achieving a legitimate aim. "Protected characteristics" would be those identified in section 4 of the Equality Act 2010. Do you agree?***

Yes, we agree with the default rule of prohibiting challenge of arbitrators based on protected characteristics. In terms of the legal consequence of such an agreement, we think that the formulation as it stands now is not sufficiently clear.

First, we suggest that '*any agreement between the parties in relation to the arbitrator's protected characteristics*' does not specify whether it refers to the whole arbitration agreement or the relevant part. Hence, by applying the validation principle, we suggest specifying '*any part of the arbitration agreement between the parties in relation to the arbitrator's protected characteristics*' to avoid potential different interpretations and lack of legal certainty.

Second, we suggest that the legal consequence of such contracting would be invalidation of the relevant part of the arbitration agreement, instead of unenforceability. This is more aligned with the text of the New York Convention that speaks about the validity (full or partial) of arbitration agreements and would be better suited for enforceability purposes.

## CHAPTER 5: Arbitrator Immunity

***Question 8***

***Should arbitrators incur liability for resignation at all, and why?***

Yes, arbitrators should incur liability for resignation. This would be consistent with the hybrid theory of arbitration inherent to the Arbitration Act 1996, the status of the arbitrator's office, and the contractual nature of their appointment. Arbitrators should be held liable for the resignation as a default rule, unless they prove the resignation was reasonable (see our response to *Question 9,* below). This approach would be aligned with the *Halliburton* decision, which calls for resignation in the case of post-appointment disclosure, as it would serve as an incentive for the increase of transparency, pre-appointment disclosure, and rejection of appointment due to lack of consent of the parties from previous arbitrations.[11] Such a provision should also be mandatory so that the parties cannot be asked to waive it in advance by means of a contract, and, consequently, to avoid any undue influence and adverse consequences for the party that does not wish to waive this liability norm.

***Question 9***

***Should arbitrators incur liability for resignation only if the resignation is proved to be unreasonable?***

Yes, we agree with this approach. However, the burden of proof should be on the arbitrators to prove that the resignation was reasonable. Whereas the liability of arbitrators for resignation should be a default rule, we suggest having an *indicative* list of circumstances in which such resignation is to be found reasonable and justified, such as an event of *force majeure*, and other circumstances which are beyond the arbitrator's control, such as illness, bereavement, public commitments, and similar.

***Question 10***

***We provisionally propose that arbitrator immunity should extend to the costs of court proceedings arising out of the arbitration, such as applications to remove an arbitrator. Do you agree?***

Yes, we agree with this approach, as reflected in the hybrid theory of arbitrators' position adopted in the Arbitration Act 1996. This proposal would confirm the status of arbitrators as decision-makers, and it would prevent any undue influence when it comes to the delivery of justice. We also note that it would not be fair for arbitrators to bear such costs in situations where they are not legally required to carry insurance. However, it is important to note that this general rule on immunity would not prevent any future claims by the party for contractual liability due to the breach of arbitrator's contract and any consequences stemming from that breach, as was provided for in *Halliburton*.

[11] *Halliburton* [2020] UKSC 48, [79], [88] (Lord Hodge) and [188] (Lady Arden).

## CHAPTER 6: Summary Disposal

***Question 11***

***We provisionally propose that the Arbitration Act 1996 should provide that, subject to the agreement of the parties, an arbitral tribunal may, on the application of a party, adopt a summary procedure to decide a claim or an issue. Do you agree?***

Yes, we agree, in principle, but we propose that the terminology to be employed should be '*early determination*' or '*early disposition*' of a claim, a defence, or an issue. The term '*summary disposition*' may wrongly suggest that the claim or issue to be determined using the procedure will deprive a party an opportunity to present its case, thereby breaching the standards of section 33(1)(a) of the Arbitration Act 1996 and Art. V(1)(b) of the New York Convention.[12] The legal literature and case law dismiss the criticisms and due process concerns as unfounded.[13]

The procedure provides a reasonable opportunity to be heard and it gives the tribunal ample opportunity of attention and scrutiny required. The only difference between the procedure and full merits hearing is that issues or claims are disposed of at the earliest opportunity, thereby enhancing the efficiency of arbitration. To reflect this understanding of the procedure, we propose that the terminology to be employed should be '*early disposition/determination*' rather than '*summary disposition/determination*.'

Many arbitral institutions have adopted approach of having expedited decision processes for unfounded claims, including ICSID, LCIA, SCC and ICC.[14] Consequently, we find that the procedure of early determination has been prominently recognised and established in arbitration practice. An express provision in the Arbitration Act 1996 would enhance the use of the procedure, in keeping with academic and judicial opinion in its favour and allaying due process concerns.[15]

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[12] Ibid 836 – 837.

[13] David L. Wallach, 'The Emergence of Early Disposition Procedures in International Arbitration' (2021) 37 Arbitration International 835. See also Leighla Bruton, 'Summary Judgment in International Arbitrations Seated in England: Recent Developments and Future Perspectives' in Gregory Roy Fullelove and others (eds), *International Arbitration in England: Perspectives in Times of Change* (Kluwer Law International 2022) 169.

[14] It was introduced into the ICSID system for the first time in 2006, through the 2006 Arbitration Rules, and it has been retained in the 2022 amendments. See further Julien Fouret, Remy Gerbay, Gloria M. Alvarez and Denis Parchajev (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary* (Edward Elgar 2019) 1190. ICSID Arbitration Rules 2022, r 41.

[15] Leighla Bruton, 'Summary Judgment in International Arbitrations Seated in England: Recent Developments and Future Perspectives' in Gregory Roy Fullelove and others (eds), *International Arbitration in England: Perspectives in Times of Change* (Kluwer Law International 2022) 169.

***Question 12***

***We provisionally propose that the summary procedure to be adopted should be a matter for the arbitral tribunal, in the circumstances of the case, in consultation with the parties. Do you agree?***

Yes, we agree, and suggest in addition that, under the Arbitration Act 1996, an applicant should be obliged to propose a suitable procedure in its application for early disposition/determination. Some institutional rules take this approach, such as the SCC Arbitration Rules 2017 and the HKIAC Arbitration Rules 2018.[16] Such an approach reflects sound practice: even though the tribunal will ultimately decide the procedure to follow, in consultation with the parties, the suggestion of an applicant may be helpful.

***Question 13***

***We provisionally propose that the Arbitration Act 1996 should stipulate the threshold for success in any summary procedure. Do you agree?***

Yes, we agree, and we add that the tribunal should have the power to assess costs, to disincentivise parties from filing frivolous applications. We agree that stipulating the threshold for success of an application for early determination/disposition would prevent the procedure from being susceptible to abuse. Also, empowering the tribunal to assess costs upon the determination of an application for early determination/disposition may disincentivise parties from filing frivolous applications.[17]

***Question 14***

***We provisionally propose that a claim or defence or issue may be decided following a summary procedure where it has no real prospect of success, and when there is no other compelling reason for it to continue to a full hearing. Do you agree?***

We disagree with the proposed threshold. As noted in the Consultation Paper, the standard of '*real prospect of success*' has been used in English case law. Substantively, it is the same as the standard of '*manifest lack of merit*' adopted by many arbitral institutions. We propose the adoption of the standard of *manifest lack of merit*, without other compelling reason for full merits hearing. This approach would align the Arbitration Act 1996 with international arbitration practice, as the standard of *manifest lack of merit* enjoys widespread usage in the arbitration community.

[16] SCC Arbitration Rule 2017 art 39(3). See also HKIAC Arbitration Rules 2018, art 43.4(c- d).

[17] David L. Wallach, 'The Emergence of Early Disposition Procedures in International Arbitration' (2021) 37 Arbitration International 835, 850.

The terminology, or its variants, is present in numerous institutional rules. For example, SCC Arbitration Rules provide for '*manifestly unsustainable*' points of facts or law;[18] ICSID Arbitration Rules provide for '*manifestly without legal merit*';[19] HKIAC Arbitration Rules provides for '*manifestly without merit*';[20] and LCIA Arbitration Rules provide for '*manifestly without merit*'.[21] The standard in the arbitration rules has also received consideration by tribunals, especially in ICSID arbitration cases. Notable examples include *Trans-Global Petroleum Inc v Hashemite Kingdom of Jordan*[22] and *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*.[23] The *Trans-Global Petroleum Inc v Hashemite Kingdom of Jordan* case stands as the first case in which the tribunal considered the point and it is the *locus classicus* case that triggered the transposition of early determination procedure from ICSID to international commercial arbitration reforms.[24] Beyond investment arbitration context, subsequent tribunals in commercial arbitration cases have also applied early determination procedure in arbitration in one form or another.[25]

England, particularly London, is seen as a global forum for arbitration and it is generally a preferred choice of seat for international arbitration.[26] The Arbitration Act 1996 should embrace the established practice of international arbitration and avoid any impression of delocalised approach, i.e. an impression that it has strong attachment to English case law in the choice of terminology.[27]

[18] SCC Arbitration Rules 2017, art 39(2)(i).

[19] ICSID Arbitration Rules 2022, art 41(1).

[20] HKIAC Arbitration Rules 2018, Art. 43.1(a).

[21] LCIA Arbitration Rules 2020 Art. 22.1(viii).

[22] ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (12 May 2008).

[23] ICSID Case No. ARB/13/32, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (2 December 2014).

[24] Aren Goldsmith, 'Trans-Global Pteroleum: 'Rare Bird' or Significant Step in the Development of Early Merits-Based Claim-Vetting?' (2008) 26(4) ASA Bulletin 667.

[25] See for example *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd* [2018] EWHC 1098 (Comm). See also ICC Case No 11413/2001 (2010) 21 ICC Ct Bull 34, First Interim Award. See also ICC Case No 12297/2003 (2011), Procedural Order of 22 August 200, as cited in Leighla Bruton, 'Summary Judgment in International Arbitrations Seated in England: Recent Developments and Future Perspectives' in Gregory Roy Fullelove and others (eds), *International Arbitration in England: Perspectives in Times of Change* (Kluwer Law International 2022) 169.

[26] Lucia Raimanova and Lucia Dulovicova, 'Recent Publications, Excursus: Brexit and Arbitration' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2018* (MANZ'sche Verlag Wien 2018) 196. See also Fulya Teomete Yalabik, 'The Impact of the Seat of Arbitration on Judicial-interference: Do Sections 67, 68 and 69 of the English Arbitration Act 1996 regarding Challenges of Awards Make London An Attractive Hub?' (2021) 70 Annales de la Faculte de Droit d'Istanbul 253.

[27] See for example Erik Marid, 'Oral Presentation of Evidence and the Application of Parol Evidence in International Arbitration' (2013) 24(2) The American Review of International Arbitration 325.

## CHAPTER 7: Section 44 (Court Powers Exercisable in Support of Arbitral Proceedings)

***Question 15***

***We provisionally propose that section 44(2)(a) of the Arbitration Act 1996 should be amended to confirm that it relates to the taking of the evidence of witnesses by deposition only. Do you agree?***

No, we do not agree that such an amendment is needed. As noted in the Consultation Paper, section 44 delineates court powers support of arbitral proceedings.[28] In relation to taking of the evidence of witnesses, this may encapsulate witness summons and depositions before a court or a court order for witness summons and depositions before an arbitral tribunal. Section 44 is optional and subject to parties' agreement. This approach does not result in redundancy of section 43. First, section 43 sets out a procedural framework for a party to seek court assistance to secure attendance of witnesses before the tribunal. While there are conditions in exercising this right, it is not optional as in the case of section 44. Even if the parties choose not to use section 44, they can still use section 43 to secure attendance of witnesses for the purpose of oral testimony. Therefore, section 43 and 44 do not give two simultaneous options to obtain witness summons, as noted in Consultation Paper (para. 7.21). Although section 44 has its roots in domestic civil litigation, its application in the context of the Arbitration Act 1996 should reflect the understanding that courts' support of arbitration is a key consideration for parties in choosing their arbitral seat.

***Question 16***

***Do you think that section 44 of the Arbitration Act 1996 should be amended to confirm that its orders can be made against third parties, and why?***

Yes, we agree that such 'textual' clarification is necessary. The parties should have the opportunity to resort to courts in support of arbitration proceedings, especially if the tribunal lacks power against third parties. The law should also be clear that the court can make its orders against foreign and domestic third parties.

[28] Please see Christopher Kee and Gloria Alvarez, 'Role of State Courts in Supporting Arbitration' in Stefan Kröll, Andrea Bjorklund, and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration,* (Cambridge University Press 2023).

***Question 17***

***We provisionally propose that the requirement for the court's consent to an appeal of a decision made under section 44 of the Arbitration Act 1996 should apply only to parties and proposed parties to the arbitration, and not to third parties, who should have the usual rights of appeal. Do you agree?***

Yes, we agree and propose additional amendments. First, the matter on appeal by third parties is closely related to arbitration proceedings and may impact its efficiency and the outcome, such appeal should be treated as an expedited proceeding. Second, since the tribunal does not have power over third parties, section 44(6) does not apply to the relationship between the court order against third parties and the tribunal's powers in the proceedings. Thus, an additional amendment should clarify the relationship between the court order against third parties and the tribunal's powers in the proceedings.

***Question 18***

***We provisionally conclude that the provisions of the Arbitration Act 1996 should not apply generally to emergency arbitrators. Do you agree?***

No, we disagree. The tribunal interim relief orders and the emergency arbitrator's decision serve an identical purpose, include assessment of parties' positions on law and fact, and require enforceability. Therefore, notwithstanding the parties' agreement on this matter, emergency arbitration should fall under the regime of the Arbitration Act 1996 with a tailored approach to accommodate its unique nature and purpose.[29] In relation to specific points of concern set out in the Consultation Paper (paras. 7.43 – 7.46) we note that instead of excluding emergency arbitrators from the Arbitration Act 1996's scope, alternative approaches are available.

First, the default rules on appointment can include a shorter timescale and a more expedited court process for appointment of emergency arbitrators. The solution is appropriate to demonstrate the courts' support of arbitration. The risk of disturbing the status quo is low, as institutional rules typically provide for a default appointment procedure in relation to emergency arbitrators, so parties will likely seldom need to resort to the courts for support. Second, the court ability to grant interim measures and the court's power to appoint emergency arbitrators are two distinct powers. We see little to no grounds for possible confusion.[30] Where the parties agree (implicitly or explicitly) on emergency arbitrators, the courts in the seat should support the enforcement of such a choice. Simply put, the courts should be able to appoint an emergency arbitrator if no other option is available. Requesting the court to do so should bar the parties from asking the court to order interim relief in the same matter, since they have already opted for tribunal ordered interim measures. Where the parties did not choose an emergency arbitrator scheme, they can resort to courts for that purpose. Third, we agree that the court should not enter emergency arbitrators' decision as a final judgment.

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[29] Ibid 6; '*Fundamentally the possibility of emergency arbitrators has not changed the supporting role courts can play in these matters. Courts will either be called upon to enforce interim measures issued by the tribunal or to consider and grant those measures themselves.*'

[30] Ibid.

However, we believe that there should be a provision addressing the enforceability of emergency arbitrators' decision in the same manner as enforceability of tribunals' interim orders.

***Question 19***

***We provisionally conclude that the Arbitration Act 1996 should not include provisions for the court to administer a scheme of emergency arbitrators. Do you agree?***

Yes, we agree with the proposed approach outlined in the Consultation Paper.

***Question 20***

***Do you think that section 44(5) of the Arbitration Act 1996 should be repealed, and why?***

We believe that section 44(5) should not be repealed as we do not see redundancy between sections 44(5) and 44(3)-(4). The standards of urgency and necessity in sections 44(3) and 44(4) guide the parties as to when and where they should apply for an interim relief.[31] Section 44(5) delineates the relationship between the courts and the tribunals in general, safeguarding the balance between support to arbitration proceedings and intervening with the procedure.[32] Therefore, while we agree that further guidance is necessary concerning what constitutes an urgent or necessary request, we believe that such need for clarity does not per se constitute a redundancy between the relevant sections.

Additionally, we do see the need for reform in other aspects of the Arbitration Act 1996 to enhance the function of sections 44(3) - 44(5). First, to avoid confusion between section 44 and emergency arbitration, the definition of an arbitral tribunal should encompass emergency arbitrators (alongside other points addressed in our response to Question 18). That would ensure a consistent reading of the scope of the tribunal's power to grant interim relief. Second, to allow the parties the full benefit of the tribunal's power to grant interim measures, section 38 should explicitly recognise that the tribunal has the power to grant interim measures even in the absence of parties' agreement.

[31] Ibid 18.

[32] In relation to the points in paras 7.67 – 7.72 of the Consultation Paper, see Ibid 18, elaborating that the language in the UNCITRAL Model Law is a way to ensure that the application for interim relief before the national courts does not constitute a waiver of the arbitration agreement; such an interpretation is the majority view in international commercial arbitration.

***Question 21***

***Which of the following ways of accommodating the orders of any emergency arbitrator do you prefer, and why? (1) (2) A provision which empowers an emergency arbitrator, whose order has been ignored, to issue a peremptory order, which, if still ignored, might result in the court ordering compliance. An amendment which allows an emergency arbitrator to give permission for an application under section 44(4) of the Arbitration Act 1996. If you prefer a different option, please let us know.***

We propose a different approach that, in allowing a court to consider use of either remedy, a better balance is achieved between the need for efficiency and enforceability, without disturbing the current mechanisms of the Arbitration Act 1996. First, as discussed in our responses to other questions in this Chapter, we propose to treat the emergency arbitrator in the same manner as the arbitral tribunal, noting the different scope of their jurisdiction and power. Second, the emergency arbitrator order does not bind the tribunal in any way and is subject to the tribunal's review.[33]

Consequently, the emergency arbitrator may issue a peremptory order to ensure the enforceability of its initial decision, if the circumstances require it. For example, peremptory orders may be issued if the tribunal has yet to be constituted and the emergency arbitrator has made an award with which the party did not voluntarily comply. Otherwise, the emergency arbitrator's decision will be subject to review by the tribunal.

In the case where a tribunal confirms the emergency arbitrator's decision; the tribunal can issue a peremptory order to ensure its enforceability. In case the tribunal does not confirm the order, but decides to amend it, revoke it, or otherwise change it, it will effectively issue interim relief and the outcome would fall under the current rules in section 41.

[33] See, e.g., LCIA Rules, Art. 9B, para. 9.11; ICC Rules, Art. 29, para 3.

## CHAPTER 8: Challenging Jurisdiction under Section 67

***Question 22***

***We provisionally propose that: (1) where a party has participated in arbitral proceedings and has objected to the jurisdiction of the arbitral tribunal; and (2) the tribunal has ruled on its jurisdiction in an award, then any subsequent challenge under section 67 of the Arbitration Act 1996 should be by way of an appeal and not a rehearing. Do you agree?***

Yes, we agree it is important to clarify the effects of section 67. The effect of a rehearing is to hear new evidence, and section 67 should not be seen as a new route to do so, as this would contravene the principles of procedural fairness, efficiency, and competence-competence. Instruments such as the Commercial Court Guide, while useful, are not sufficient, particularly when international disputing parties are resorting to English courts, due to an English seated proceeding. This amendment will (1) make clear that a challenge to the tribunal's jurisdiction is not a new opportunity to submit new evidence to a new judicial body (i.e., courts) and (2) clarify that within the Arbitration Act 1996 there are already in place other systems of 'jurisdictional' control, including sections 32 and 72, as well as the New York Convention.

***Question 23***

***If section 67 of the Arbitration Act 1996 is limited, in some circumstances, to an appeal rather than a rehearing, do you think that the same limitation should apply to section 32, and why?***

The threshold in section 32 is much higher than that of the section 67 given the permission requirements. While this reform seems to be urgent for section 67, it might not be case for section 32. Section 32 is mainly addressed to the court and the requirements needed for the court to review a jurisdictional objection. In contrast, section 67 is a provision addressed to the disputing parties, mainly the dissatisfied party seeking to activate courts proceedings. However, for the sake of consistency, it should be also clarified what are effects of the jurisdictional objection under section 67 with the aim of limiting the type of assessment conducted by the court.

***Question 24***

***We provisionally conclude that our proposed change to section 67 of the Arbitration Act 1996 would not require any similar change to section 103. Do you agree?***

Yes, as mentioned in our response to Question 22, section 103 is the right 'control' mechanism to review a tribunal's decision on jurisdiction, which is aligned with the New York Convention and general practice in international arbitration.

***Question 25***

***We provisionally propose that, in addition to the existing remedies under section 67(3) of the Arbitration Act 1996, the court should have a remedy of declaring the award to be of no effect, in whole or in part. Do you agree?***

Yes, we agree with the proposal and explanation given in the Consultation Paper.

***Question 26***

***We provisionally propose that an arbitral tribunal should be able to make an award of costs in consequence of an award ruling that it has no substantive jurisdiction. Do you agree?***

Yes, we agree with this proposal, as it would be consistent with the competence-competence doctrine, according to which an arbitration tribunal has the competence to decide on its own jurisdiction. Costs associated with that decision should also fall under the tribunal's competence. This is also in line with the general practice to foster procedural efficiency.

## CHAPTER 9: Appeal on a Point of Law

***Question 27***

***We provisionally conclude that section 69 of the Arbitration Act 1996 strikes the right balance between competing interests in respect of the ability to appeal an arbitral award on a point of law. We do not therefore propose any reform to section 69. Do you agree?***

The balance between finality and efficiency in domestic arbitration is slightly different to that in international arbitration. In domestic arbitration (i.e., domestic parties, subject matter, and law), disputing parties benefit from an opt-out appeal system under section 69. Therefore, in the context of domestic arbitrations, we do not propose any changes. In international arbitrations, the option under section 69 (alongside other examples mentioned in the Consultation Paper) is an exception compared to the approach in UNCITRAL Model Law jurisdictions. Moreover, analysis of users' preferences shows no deference to the possibility of an appeal on the point of law. Instead, users are more interested in the efficiency and finality of the award.[34] As a result, parties would typically consider the appeal an opt-in mechanism insofar as it meets their needs. Therefore, we suggest that section 69 ought to be available as an opt-in mechanism for international arbitrations.

[34] See e.g., Queen Mary, *2018 International Arbitration Survey: The Evolution of International Arbitration* (Report, 2018) and Queen Mary, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World* (Report, 2021).

# CHAPTER 10: Minor Reforms

***Question 28***

***Do you think that section 7 of the Arbitration Act 1996 (separability of arbitration agreement) should be mandatory, and why?***

Yes, we think that section 7 should be mandatory. This is because recognition of the separability principle will be an exercise in recognising what is already established in common law for seated proceedings under the Arbitration Act 1996. *Fiona Trust* was just the first of many subsequent cases, establishing the importance of the principle of separability with the aim of safeguarding the remaining contractual rights and obligations of the disputing parties.[35] Section 7 being mandatory means that the arbitration agreements will be *de facto* treated as distinct agreements. In relation to this amendment, four significant consequences can be foreseen.

First, arbitration tribunals will have the competence to determine and issue an award on the formation, validity, and the scope of the arbitral agreements. In case the autonomy of an arbitration agreement is not supported by the above-mentioned mandatory condition, the basis of section 30 would be vague.

Second, the consensus on the invalidity of the main contract having no effect on the validity of the arbitration agreement will also be adopted. Thus, uncertainties and discussions over the limits of separability would be clarified. Moreover, inconsistent, and contradictory awards on this issue would be precluded.

Third, section 7 has crucial importance in terms of designating the applicable law to arbitration agreements. The general principle is that if there is no explicit or implied choice of law specified in the arbitration agreement, the governing law is either the law in the main contract, the law of the seat, or the most closely connected law. On the other hand, in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb & Ors* the Court of Appeal held that the separability of arbitration agreement signifies that a choice of law provision in the main contract does not directly extend to the arbitration agreement.[36] From this point of view, counting arbitration agreement as an extension of the main contract and applying to the main contract for reference will not always be the most rational solution or practice.

Finally, with this amendment, arbitration agreements will be safeguarded from challenges caused by idiosyncratic or discriminatory rules of national law which usually constitutes the main purpose and the origin of the 'arbitration' concept itself. We believe that section 7 being mandatory will reinforce the arbitration agreement and serve the main objectives of its existence.

[35] *Fiona Trust v Privalov* [2015] EWHC 527 (Comm).
[36] [2020] EWCA Civ 574.

***Question 29***

***We provisionally propose to confirm that an appeal is available from a decision of the court under section 9 of the Arbitration Act 1996. Do you agree?***

Yes, with a caveat. We agree that a limited right of appeal should be available under section 9. We do not agree with a complete reversal of the *status quo*. We propose that the option to appeal be limited by a mechanism similar or identical to the one in section 32(6), which limits the type of decisions that may be appealed. We are inclined towards a restrictive approach because allowing such appeals would result in scope for tactical claims and unduly prolonged proceedings. Further, amending section 9 to include a blanket right to an appeal, when no right to appeal was available previously at that stage of the arbitration, could be perceived as reducing the pro-arbitration status of the jurisdiction.

***Question 30***

***Do you think that an application under section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction) and section 45 (determination of preliminary point of law) should merely require either the agreement of the parties or the permission of the tribunal, and why?***

Yes, for two main reasons, there is a need to streamline the requirements established in these two sections. First, it is well-established in arbitration practice that once parties have agreed to arbitration, they have conferred to the arbitration tribunal the powers and authority to decide their case. Therefore, it is not necessary to add a 'second-lock' to the tribunal's permission as their powers have been already given by agreement of the parties. Second, courts can moderate in a case-by-case analysis the requirements on costs and timings; what is important is that the Arbitration Act 1996 gives clarity across its different sections on the different application requirements. In other words, costs and delay are already addressed and supervised elsewhere in the Arbitration Act 1996 (i.e., sections 61, 63 and 73) and these do not need to be duplicated in sections 32 and 45.

***Question 31***

***Do you think that the Arbitration Act 1996 should make express reference to remote hearings and electronic documentation as procedural matters in respect of which the arbitral tribunal might give directions, and why?***

Yes, there should be an explicit mention of remote hearings. Arbitral practice has treated decisions regarding the format of hearings as a procedural matter that has been largely dealt with by having regard to the wishes of the parties. Being clearly classed as such via an express provision would enable the tribunal to consider this issue more efficiently during proceedings. It is proposed that a similar formulation to Article 27(2) of the Swiss Arbitration Rules 2021 would be the most effective. This reads as follows: '*Article 27(2). Any hearings may be held in person or remotely by videoconference or other appropriate means, as decided by the arbitral tribunal after consulting with the parties*.'

In the alternative, we call for the review of section 34(2), which could be amended to include the power of the tribunal to decide whether to make use of remote proceedings. Such change would reflect arbitral practice and technological advancement. A recent empirical study by the International Council for Commercial Arbitration suggested that it is within the inherent procedural powers of the tribunal to decide the mode of proceedings (physical, remote or hybrid) in commercial arbitration.[37] Further, the same research concluded that the tribunal's power to enforce a remote hearing is not, in principle, in breach of the parties' right to a fair trial.[38] Finally, arbitral institutions have experienced a significant increase in arbitrations held fully or partially remotely.[39] The above points are a strong indication of the increasingly important role of remote hearings in the conduct of international arbitrations. Acknowledging the tribunal's inherent power to decide on the mode of hearings in section 34 would resolve any uncertainty surrounding the topic for arbitrations with a seat in E&W.

There remain procedural questions surrounding remote hearings, such as ensuring procedural fairness in their course. However, the Arbitration Act 1996 does not need to make express provision regarding these questions at this stage, since to do so could be overly restrictive of the arbitral tribunal's authority to manage process in accordance with the needs of the parties and the case. Due process requirements, already embodied in the Arbitration Act 1996, and the arbitral practice (both domestic and international) are apt to effectively govern these issues.

***Question 32***

***Do you think that section 39 of the Arbitration Act 1996 should be amended to refer to "orders" (rather than "awards"), and why?***

Yes. Academic commentary suggests, persuasively in our view, that the term 'award' should be reserved only for tribunal decisions demonstrating **all** the following qualities:

1. The tribunal is exercising its authority to render the decision.
2. The decision disposes wholly or partially of a dispute of the arbitration.
3. The dispute is substantive and is being resolved in a final manner.[40]

[37] Giacomo Rojas Elgueta, James Hosking, and Yasmine Lahlou, 'General Report' in James Hosking, Yasmine Lahlou and Giacomo Rojas Elgueta (eds) *Does a Right to a Physical Hearing Exist in International Arbitration? Investigating the Legal, Conceptual and Practical Implications of Remote Hearings in International Arbitration* (ICCA Reports No 10, 2022), 25 < https://www.arbitration-icca.org/icca-reports-no-10-right-to-a-physical-hearing-in-international-arbitration> 14 December 2022.

[38] Maria Beatrice Deli, 'Remote Hearings and the Right to a Fair Hearing in Public International Law' in Ibid 123.

[39] Giacomo Rojas Elgueta and Benedetta Mauro, 'Remote Hearings: The Arbitral Institutions' Perspective' in Ibid 253-254.

[40] For further discussion on the distinction between tribunal decisions including 'awards,' 'orders' and 'interim awards,' see Konstantina Kalaitsoglou, 'Exploring the concept of arbitral awards under the New York Convention' (2021) 5(1-2) Journal of Strategic Contracting and Negotiation 99.

Section 39 refers to tribunal decisions granting relief on a provisional basis, which might be reversed or amended before or in the rendering of the arbitral award. The nature of this type of tribunal decision is in line with our academic understanding of a tribunal '*order*,' which possesses element (i) referred to above but does not possess elements (ii) & (iii), especially finality. Further, section 39(1), in its current formulation refers to '*provisional awards*,' whose precise meaning and scope are contested and vary amongst jurisdictions. Accordingly, amending section 39 to refer to '*orders*' is a step towards clarification of the taxonomy and terminology of tribunal decisions while continuing to serve the purpose of the provision.

***Question 33***

***Do you think that section 39(1) of the Arbitration Act 1996 should be amended to refer to "remedies" (rather than "relief"), and why?***

Yes, we agree. Common law already gives the user a wide appreciation on the types of remedies that can be granted in E&W, and which, therefore, are part of the arbitration practice for seated proceedings under the Arbitration Act 1996. The difference between remedy and relief is often based on doctrinal notions rather than a fundamental 'problem' in the arbitration practice. More specifically, relief is a notion associated with pecuniary compensation, while a remedy can include a declaratory outcome on a disputed issue or to order specific performance. Therefore, the concept of remedy is broader and encompasses further matters. We are of the view that this amendment will be helpful, especially for the international user coming from another legal culture.

***Question 34***

***We provisionally propose that section 70(3) of the Arbitration Act 1996 should be amended so that, if there has been a request under section 57 for a correction or additional award material to the application or appeal, time runs from the date when the applicant or appellant was notified of the result of that request. Do you agree?***

Yes, we agree that this provision should be amended as proposed. It is fair that an applicant/appellant awaits the outcome of the process of correction or additional award under section 57 if the correction or additional award is material to their application or appeal. We note that this approach aligns with the standard in the UNCTIRAL Model Law (Article 34(3)) and the Arbitration (Scotland) Act 2010 (Schedule 1, Rule 71). We also note that it is aligned with case law, especially on the materiality of the correction or additional award to the proposed appeal or application. The point on materiality will likely prevent an abuse of the provision for frivolous application for correction or additional awards to gain more time for appeal or application against the award. In addition, section 57(7) of the Arbitration Act 1996 provides that any correction of an award shall form part of the award. This is a clear indication that an award which is under review for correction is not yet complete, especially on the point(s) or portion(s) to be corrected. As for additional awards, this logic also applies, although section 57 is silent on the point. This is because the need to render additional award implies that the existing award is not yet complete by itself. We believe that this is an additional reason for which streamlining section 70(3) with section 57 is fair. It will ensure that an award is complete before the time for an application or appeal to challenge it begins to run.

***Question 35***

***We provisionally conclude that section 70(8) of the Arbitration Act 1996 (granting leave to appeal subject to conditions) should be retained as we consider that it serves a useful function. Do you agree?***

Yes, we agree that section 70(8) of the Arbitration Act 1996 should be retained. This is because section 70(8) relates to an appeal emanating from challenging an award on grounds of substantive jurisdiction and serious irregularity, or an appeal on a point of law. In such applications, the Arbitration Act 1996 permits the court in which the decision was made in sections 67(4), 68(4) and 69(8) the power to grant leave to appeal. For a party to appeal such decisions the court in which a decision is made may decide to permit an appeal subject to the satisfaction of conditions concerning security for costs or payments into court. Therefore, section 70(8) of the Arbitration Act 1996 recognises the importance of security for costs or payments into court in appeals emanating from challenges based on grounds of substantive jurisdiction and serious irregularity, or an appeal on a point of law.

***Question 36***

***We provisionally propose that sections 85 to 87 of the Arbitration Act 1996 (on domestic arbitration agreements) should be repealed. Do you agree?***

Yes, we agree that sections 85 to 87 of the Arbitration Act 1996 should be repealed. Sections 85 to 87 of the Arbitration Act 1996 recognise that there may be differences between international arbitration and domestic arbitration. This approach is taken in, for example, Switzerland and France. The Arbitration Act 1996 has applied to both international and domestic arbitration without sections 85 to 87 being in force and has not occasioned any problems or affected the use of the Arbitration Act 1996 for domestic arbitration. Therefore, a distinction between international and domestic arbitration is not relevant in the context of the Arbitration Act 1996. The distinction between international arbitration and domestic arbitration is diminishing, as recognised in Hong Kong and Belgium where the UNCITRAL Model Law, which is of international character, applies to international and domestic arbitration. The provisions in the Arbitration Act 1996 should apply to international and domestic arbitration.

## CHAPTER 11: Other Stakeholder Suggestions not Short-Listed for Review

***Question 37***

***Do you think that any of the suggestions discussed in Chapter 11 needs revisiting in full, and if so, why?***

Yes, we think that (1) third party funding (TPF) and (2) tribunal's power to amend statements need further revision.

First, the disclosure of TPF should be mandatory with a view to safeguarding the whole arbitral procedure. This would address concerns regarding the independence and impartiality of arbitral tribunals. As stated in the IBA Guidelines 2014 General Standard 6(b), third party funders in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. It follows that non-disclosure of TPF may result in undesirable consequences, including potential challenges to the appointed arbitrator, or even the arbitral award being set aside or annulled. Even though it may seem like disclosure of TPF causes redundant applications for security for cost, TPF is not determinative in deciding on such applications. In fact, in investment treaty practice an application for security for costs was rejected when the application is solely based on TPF involvement.[41]

Second, section 34 (c) allows parties to amend statements but there is no explicit expression of extent to which these amendments can be made. We suggest that section 34 should empower the tribunal to make amendments for closely related but new issues. This solution could preclude the challenge of the award under section 68, as seen in *PBO v (1) Donpro and others* (2021) EWHC 1951(Comm).[42] For this reason, we submit that discretion of the tribunals should be identified in deciding whether the new claims or reference matters should be brought into the jurisdiction.

***Question 38***

***Is there any significant topic within the Arbitration Act 1996, not addressed in this consultation paper, which you think is in need of review and potential reform? If so, what is the topic, and why does it call for review?***

Yes, the review of section 19 might be necessary. If the approach suggested in the Working Group's answer to Question 7 of this Consultation Paper, it is logical that section 19 should be

[41] See, for example, *EuroGas Inc and Belmont Resources Inc v Slovak Republic* (ICSID Case No. ARB/14/14) (Procedural Order No 3) (23 June 2015); *South American Silver Ltd (Bermuda) v Bolivia* (UNCITRAL) (PCA Case No 2013-15) (Procedural Order No 10) (11 January 2016); *Julio Miguel Orlandini-Agreda and another v Bolivia* (PCA Case No 2018-39) (Decision on the Respondent's Application for Termination) (Trifucation and Security for Costs) (9 July 2019); *Bay View Group LLC and another v Republic of Rwanda* (ICSID Case No ARB/18/21) (Procedural Order No 6) (28 September 2020).

[42] The Commercial Court found that the tribunal's refusal to permit the claimant to amend its statement of case, and the fact that the tribunal had reached the conclusion without providing the claimant to address matters which the claimant party considered to be several new grounds of appeal, caused serious irregularity in arbitral proceedings. The court found that the tribunal was not complying with its duties under section 33 resulting in procedural irregularity in the proceedings which led to substantial injustice.

amended for consistency.[43] Accordingly, 'in deciding whether to exercise, and in considering how to exercise, any of its powers under section 16 (procedure for appointment of arbitrators) or section 18 (failure of appointment procedure),' the court would need to apply the non-discrimination standard discussed in Chapter 4 of this Consultation.

[43] Please see page 7 of this Consultation Paper.

# IV. ANNEXES

Article

Journal of Strategic Contracting and Negotiation
JSCAN

# Exploring the concept of arbitral awards under the New York Convention

Journal of Strategic Contracting and Negotiation
2021, Vol. 5(1-2) 99–112

DOI: 10.1177/20555636211022839
journals.sagepub.com/home/jsc
SAGE

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**Abstract**

Despite its importance, the arbitral award was left undefined by the New York Convention and most other major international arbitration laws. This has inevitably led to varying opinions regarding its nature and confusion regarding the thresholds that differentiate arbitral awards from other tribunal decisions. Partly in response to the above, there has been discussion to initiate the revising process of the Convention. Responses have been divided. In this paper, the author finds that revision will not bring the desired results, while the Convention itself has equipped international arbitration practice with tools to overcome obscure legal concepts such as the arbitral award.

**Keywords**

dispute resolution, commercial contracting, arbitration award.

## Introduction

The arbitral award is undisputedly the most powerful legal document today, considering that no court may review it on its merits and is enforceable almost anywhere in the world through the streamlined system of the New York Convention on Recognition and Enforcement of Foreign Awards (1958) (hereafter New York Convention) (Hill, 2018; Kirby, 2014). Despite its importance and power, or because of it, the arbitral award is not defined expressly in either the New York Convention or in the United Nations Commission on International Trade Law Model Law (2006), which cumulatively reflect a significant part of contemporary arbitration legislation. Most national arbitration laws also leave the concept undefined; the Arbitration Act 1996 of England and Wales and the Arbitration (Scotland) Act 2020 do not include a definition of the arbitral award.

The absence of a fixed definition has considerable perils. The concept becomes unpredictable and confusing, primarily when distinguishing awards and procedural orders, and legal nuance

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occurs as the nomenclature is used inconsistently. Because of the unpredictability, confusion and inconsistency surrounding the concept, tactical challenges of arbitral awards are not uncommon, causing the perpetuation of the issue and unnecessary expenditure at the enforcement stage. Even though a clear-cut definition does not exist, what is reasonably certain is the contextual make-up of arbitral awards, their characteristics and function, which subtly but arguably clearly indicate the differences between arbitral awards and other documents. According to this author, amending an international instrument that is as widespread as the New York Convention assumes more risks than benefits. In the particular context, the clear taxonomy of types of awards and arbitral decisions other than awards can be as efficacious as a definition. In that regard, 'The core elements of arbitral awards: a suggested taxonomy' section of this article reviews leading case law on the matter, drawing conclusions from various jurisdictions and providing a suggested taxonomy of arbitral awards and other tribunal decisions.

## The perils of the undefined arbitral award

Legal practice demands certainty and predictability; the fact that there is no 'mainstream view' when distinguishing awards from other tribunal decisions has caused concern (Hill, 2018). International arbitration is a relatively new discipline that has grown into being the predominant choice when adjudicating cross-border issues. According to a joint report of the School of International Arbitration and the Queen Mary University, international arbitration alone or combined with other alternative dispute resolution methods was the preferred choice of 97% of participants (Friedland and Brekoulakis, 2018). In turn, what convinced 64% of market actors participating in the study to select international arbitration over litigation was, by and large, the enforceability of arbitral awards (Friedland and Brekoulakis, 2018). It is evident that international arbitration is more than an area of law; it is intertwined with the industry and a product of its need to resolve disputes efficiently and with certainty. Consequently, in the context of international arbitration, legal certainty has an entirely different weight than the axiomatic nature it holds with regards to other areas of law (Wallis, 2016). Therefore, the severity of inconsistency should not be discounted, especially when it concerns what parties hold most dear: the arbitral award and its enforcement.

Turning to the particular issues arising from the lacking definition, while in most cases, problems invariably arise from treating some arbitral awards as 'non-final' when their effect was intended to be final and binding, these are mostly concerned with the inconsistent use of terminology. The absence of clear distinctions in international instruments of what constitutes an award and its differentiators from other tribunal decisions has inevitably resulted in scholars and national courts contributing their own *lex ferenda*, while what constitutes an award remains inconclusive (Hill, 2018).[1] The courts' interpretations of the concept of the award will be discussed later. At the present stage, it is crucial to note that the perplexity of the issue has an added linguistic strand that is impossible to ignore: inherently, the terms describing specific awards conflict with their 'final and binding' nature. According to the Cambridge Dictionary, 'interim' is a synonym for 'temporary', but an antonym to 'final' (McIntosh, 2013). Considering the irreconcilable terms, it is perhaps a futile task to request a universal definition of the arbitral award instead of focusing on delineating the current legal terms. The linguistic paradox has led to various other inconsistencies in institutional arbitration rules and consequently in arbitration practice, ultimately leading to inconsistent treatment by courts and uncertainty.

Illustratively, inconsistencies exist in the respective arbitration rules of international institutions. For instance, Article 2(v) of the International Chamber of Commerce (ICC) Arbitration

Rules 2020 refers to the 'award', including '*inter alia*, an interim, partial, final, or additional award', signalling the interchangeability of the types of awards and their nature as nomenclature without any further reference to problematic instances, such as the minute and sophisticated differences between interim awards and specific interim measures (ICC, 2020). Article 26.1 of the London Court of International Arbitration (LCIA) Rules 2020 specifically mentions a tribunal's power to 'make separate awards on different issues at different times' (LCIA, 2020). The first part of Article 26.1 is relatively undisputed – perhaps because of its general expression. The *proviso* mentions a relevant example of the said 'awards'; the controversial 'interim payments' (LCIA, 2020). Notably, 'interim payments' are included in Article 26, entitled 'Awards' and not in Article 25, entitled 'Interim and Conservatory Measures', without referring to the rationale behind that categorisation (LCIA, 2020). While the instruments mentioned above are not inherently more problematic than any other available institutional arbitration rules, they demonstrate how the current terms interact inefficiently.

The inconsistency naturally extends to arbitration practitioners. As early as 1990, the ICC reported several practical difficulties related to not having a standard definition of arbitral awards (ICC, 1990). For instance, 'interim' and 'partial' awards were found to be 'used virtually interchangeably', 'procedural decisions have occasionally [been] categorised as "awards"', and rarely, 'decisions on prejudicial issues [were] categorised as "procedural decisions"' (ICC, 1990). Illustratively, in *Resort Condominiums International Inc. v. Bolwell (1995)*, the decision under consideration was characterised both as 'order' and 'award' ('Interim Order and Award') producing a confusing result as to its nature. More recent evidence has shown that the terms 'award', 'order', 'decision' are still being used inconsistently, creating complexity (Hill, 2018). In *Aero Club v. Solar Creations Pvt Ltd (2020)*, the Court is not distinguishing between interim and partial awards, on multiple occasions, referring to 'partial final award[s]' and interim awards interchangeably. Therefore, setting clear distinctions between what constitutes each term – partial, interim, etc., and insisting on their correct use, could be as efficient as explicitly defining awards. While the *status quo* might not be as severely flawed today as it was in 1990, potentially because of the effective dissemination of information and education on international arbitration practice and procedure, the inconsistencies still exist and have led to unorthodox practices. For instance, the importance of jurisdiction is indisputable, especially considering the special significance of the arbitration agreement and its vitality in safeguarding the integrity of the arbitral process. However, from a terminological point of view, it is not clear why there are 'jurisdictional awards'. Other procedural decisions of arguably the same significance are not classed as awards. Drawing from the above example, it remains a residual thought whether negatively defining the award is far more effective than including a fixed definition. The jurisdictional award indicates that international arbitration practice is a powerful force in interpreting international arbitration legislation, for example, should tactical challenges of jurisdictional decisions not exist; today, jurisdiction awards could have been fiction.

## Amending the New York Convention is not a viable solution

A fixed definition of arbitral awards under the New York Convention could have uncomplicated a significant number of situations lacking clarity. However, it is highly questionable whether states can reach a consensus or whether such a definition will act for the better or worse in international arbitration practice. Arguably, a taxonomy of the current terms can be just as formidable in providing certainty and consistency.

## Diverging idiosyncrasies

From the outset, negotiations of the New York Convention, the ICC's Report and Preliminary Draft Convention (1953), loudly noted that while it was 'necessary to give a precise definition [of arbitral awards relating to international commercial disputes]', it was 'inadvisable to stipulate a generally applicable qualification' of the concept (ICC, 1953). The primary reason behind the ICC's suggestion was that the Convention was intended to be widely adopted, and therefore a standard definition would be a deterrent to international consensus. Consequently, the *travaux preparatoires* of the New York Convention contain elaborate discussions on the respective articles referring to arbitral awards and their characteristics but carefully avoid definitively qualifying the concept. The ICC was not wrong – even at the time, at the dawn of globalised trade, an international consensus was a target out of reach. To date, there has been no formulation of a definition to have passed the crystallisation point. The latest attempt of a definition proposed by the Model Law Working Group (330th meeting, 1985; Report of the Working Group on International Contract Practices on the Work of Its Seventh Session, 1984) is worth examining. The definition, purported to be inserted under Article 34 of the Model Law (2006), defined awards as 'disposing of all issues submitted to the tribunal' and 'any other decision of the tribunal which finally determines any question of substance' or 'any other question of procedure (…) if the tribunal terms [such a decision] an award' (330th meeting, 1985; Report of the Working Group on International Contract Practices on the Work of Its Seventh Session, 1984). The formulation was found to be both restrictive and highly unlikely to be agreed upon by the majority (Born, 2014; Gill, 2008). The issues are evident; international arbitration practice recognises types of awards that directly contrast or conflict with one or all of the qualifications proposed in the formulation. For instance, as will be discussed later, a mostly undisputed characteristic of awards is that they settle substantive issues, but the formulation directly includes procedural decisions in its scope. Interestingly, the Working Group reports that the first part, 'up to the word "substance"', 'was met with "wide support"'. However the latter part, regarding procedural decisions, divided negotiators.

From the New York Convention negotiating parties to the Model Law Working Group and most modern national Arbitration Acts, a definition of the arbitral award was consistently excluded. The phenomenon is not because of capricious behaviour by the respective groups; instead, it reflects a bitter truth: legal unification is impossible at the transnational level. Although the New York Convention is a manifestation of states willing to recognise documents as powerful as the awards, it remains considerably different from what should constitute an award for each state. The existing areas of disagreement, their nature and root, and whether these are irreconcilable is worth understanding. While reaching consensus is not a challenge specifically tied to arbitral awards or the New York Convention, it results from the opposite theoretical foundations underlying the different interpretations, making the task of reaching a consensus impossible.[2] Accordingly, national courts of states tending to the delocalised or a-national theories of arbitration, such as France, have developed a mutually exclusive concept of awards from states abiding by the localised theory. These differences are rooted in policy, and it is very doubtful that they will ever converge in a streamlined, global definition of the arbitral award (Hill, 2018). The divergent idiosyncrasies around international arbitration became more prominent since the development and popularisation of investor-state arbitration, where states frequently found themselves in the defendant's shoes, many times required to enforce awards contra to their interests, which arguably caused resistance to enforcing and recognising awards more broadly (Gaillard, 2009; Garcia et al., 2015; Montanaro and Violi, 2020). Illustrative to the above point is the expansionist outlook many

national courts take on Article V(1)(e) of the Convention, the public policy ground for non-enforcement (Hill, 2018). Such an expansionist view was that of Lee J in Resort Condominiums International Inc. v Bolwell (1995), who found that Article V(1)(e) – allowed 'residual discretion' to national courts to refuse recognition and enforcement of awards. This view is rejected by the legal theory of arbitration perpetrated by Gaillard (2013), the transnational legal theory of arbitration.

It is accepted that when drafting international instruments, reaching consensus is inherently difficult. However, it is essential to note the shifted socioeconomic landscape between the drafting of the New York Convention and the present time, which makes reaching consensus unattainable. Arguably, the chasm between national policy was significantly smaller in the dawn of the New York Convention, allowing for relative consensus to be achieved in its text, while irreconcilable points, such as the definition of arbitral awards, were left untouched (Gaillard, 2009). Further, the decade of the drafting of the Convention was marked by states' collective efforts and to reinforce trade in light of ceasing and preventing the reignition of war (Krpec and Hodulak, 2019; McDonald, 2004; Sutton, 1967). Having experienced the consequences of World War II (WWII) on national economies, political leaders could have been relatively flexible with concessions at the drafting stage of the New York Convention, which was marked by an era of multi-state cooperation on numerous international trade law conventions (Garcia et al., 2015). Montanaro and Violi (2020) now paint a profoundly shifted landscape, distinctively characterised by the 'disintegration of international economic integration', upon which international trade law is contingent. The significant change of attitude is evidenced in legal, social and political reality. In the past few years, the world witnessed the World Trade Organization's demise and several denunciations of the International Centre for Settlement of Investment Disputes Convention. Even at the European Union (EU) level, a prime example of economic integration and legal harmonisation suffers from 'nationalist responses' to such unification (Montanaro and Violi, 2020). Besides the prominent example of Brexit, several EU states saw nationalist parties on the rise, including France and Greece – both at some point considering an exit from the EU. Consequently, the political, socioeconomic and legal panorama is significantly different – and more averse to transnationality than it was at the drafting stage of the New York Convention.

Divergence is further observed intrinsically to international arbitration practice; as arbitration is growing in popularity, it is natural for its concepts, including the arbitral award, to evolve. However, the development is not symmetrical, and the parameters influencing both legislative action and international arbitration practice fluctuate significantly according to state, resulting in inhomogeneity and divergent interpretations (Hill, 2018). Of course, inhomogeneity becomes an issue only if homogeneity is desirable in the context of international arbitration, and while market actors would undoubtedly root for a streamlined homogeneous system, governments are becoming increasingly averse to it (Montanaro and Violi, 2020). Accordingly, a reconsideration of its clauses or concepts bears the danger of destroying what is otherwise one of the most popular Conventions to date.

## *A fixed definition of arbitral awards is likely to introduce further inconsistency*

Although in a different context, Schwenzer and Hachem (2009) explained that definitions could do more harm than good in international instruments that are not uniformly interpreted by a higher international court, which produces authoritative precedent.[3] Even if enacting a streamlined definition under the New York Convention was an achievable reality, the divergence in idiosyncrasies

would result in an asymmetrical application, further perplexing the situation. It is realistic that uniform international laws 'must rely on a certain degree of imprecision' to preserve their flexibility and adaptability to change (Schwenzer and Hachem, 2009). Unlike national laws, which are subject to change at parliamentary motion, international treaties such as the New York Convention would require significantly greater effort to be amended in case an addition later proved problematic. Therefore, including a definition could prove a rigidity unable of improvement or adaptation to modern international practices for an extended period of time. Being one of the most popular international instruments today, the New York Convention is no exception; defining arbitral awards could alter the status quo for the worse, halting any meaningful progress of the past 50 years.

As Schwenzer and Hachem (2009) noted, international law has natural mechanisms of achieving the desired degree of harmonisation; notably, the principles of autonomous interpretation and 'having regard to [their] international character'. Further, Article VII of the New York Convention has provided for the 'evolution of arbitration law' by prescribing the 'minimum standard' (Gaillard, 2009). While signatories are allowed to be more liberal regarding the recognition of arbitral awards under the New York Convention, they are not allowed to be more restrictive (Gaillard, 2009). Accordingly, any confusion arising from inconsistent national interpretations could be avoided if the definition of awards is interpreted considering the broader context and function of the New York Convention and international arbitration in general. Specifically, inconsistent interpretations would be reduced if national courts treated them as obsolete and instead giving effect to interpretations that are in line with the Convention's spirit. Although such observations of national courts could not constitute a *stare decisis*, they could reduce the adverse effects of not having a definition under the Convention. Today, there seems to be no opposition to a method of interpretation of arbitral awards close to that proposed by Schwenzer and Hachem (2009). Fortunately, interpretation, according to national law, was rejected from its outset (Born, 2014; Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards, 1956). The International Council for Commercial Arbitration (ICCA) Guide to the Interpretation of the New York Convention (2011) expressly states that national courts interpreting the Convention must strive towards uniformity, while there have been several instances where national courts produced dicta explicitly prioritising uniformity. For example, *Merck v. Tecnoquimicas (1999)* held that the definition of arbitral awards should be interpreted according to the 'spirit of the Convention'.

Formulating a definition might be uncritical, in view of inconsistencies not being fundamentally unsound, while idiosyncratic interpretations are generally regarded as 'not authoritative' by international arbitration practice (Born, 2014). While it is challenging to determine the authoritativeness of a court decision referring to arbitral awards under the New York Convention and therefore, understand whether international arbitration practice tends to uniformity, the existence of international dialogue, at judicial and non-judicial level, is proof that the New York Convention's internal mechanism for development and adaptation to modernity is effective. In this author's opinion, this is partly due to the increasing institutionalisation of international arbitration, it is cementing as an international dispute resolution mechanism, and the thoughtful dialogue this development has instigated. Simultaneously, it has become increasingly popular for states interested in arbitration to adopt a pro-arbitration attitude and endorse an interpretation of the New York Convention that is as independent as possible from national law principle. For instance, states such as the Philippines, which have recently entered the international dispute resolution market as arbitration-friendly states, have produced verdicts that align with the popular view when it comes to the interpretation of the New York Convention (*Mabuhay Holdings Corporation v. Sembcorp Logistics*

*Limited, 2018*). It is unquestionable that international dialogue at a judicial level, in addition to scholarly work and practice, are elements that ensure the development of the regulatory scene of the New York Convention in particular and international arbitration in general. There is ample evidence to suggest that if required, the international arbitration community will engage in international dialogue regarding the nature of arbitral awards and thus, facilitate adaptation to the most suitable concept. Although a fixed definition could harmonise to a degree what is the arbitral award, it is – to an extent, futile to dedicate substantial effort in finding its exact definition, considering it is not uncommon for fairly detailed legal definitions to be interpreted significantly differently by courts.

## The core elements of arbitral awards: A suggested taxonomy

In sections 'The perils of the undefined arbitral award' and 'Amending the New York Convention is not a viable solution', it was examined why it is crucial to have a clear-cut definition of the arbitral award and how that would help avoid costly proceedings at the recognition and enforcement stage. Further, it was suggested that defining the arbitral award negatively by creating a taxonomy of the different types of awards and drawing clear distinctions from other tribunal decisions could be just as efficient as having a formal definition. In this section, the author considers the fragments indicative of the concept of arbitral awards critically and analyses the core elements of arbitral awards, which effectively separate awards from other tribunal decisions.

### *An exercise of the tribunal's authority*

As observed by Born, the award must be the product of 'the implementation of an agreement to arbitrate', which serves as the initial point for the 'making' award (Born, 2014). A valid arbitration agreement confers jurisdiction to the tribunal to deal with the specific dispute and produce an award (Born, 2014).[4] In contrast to the arbitral award, arbitration agreements are well defined, both contractually, by the respective parties in an arbitration, and theoretically, by Article II New York Convention, Chapter II of the Model Law and most national arbitration legislation. In that regard, the detailed understanding of arbitration agreements seems to counterbalance the need for a fixed definition of arbitral awards. This is a compelling dynamic, considering that the tribunal is entitled to exercise its authority over the dispute and produce a final and binding award if a valid arbitration agreement exists. Accordingly, the award produced by the tribunal must necessarily be an exercise of its authority.

Notwithstanding, there are several associated rules, which international arbitration practice has developed regarding arbitral awards and the adjudicating powers conferred to the tribunal by the parties. It is well established that tribunals cannot rubber-stamp decisions (Blackaby et al., 2015). It does not suffice that an agreement has been reached between the parties through alternative methods. Even if an arbitration agreement exists, a panel of arbitrators must deliberate the dispute for an award to be produced. In *Perusahaan Gas Negara v CRW Joint Operation (2015)*, Sundaresh J was categorical that it was impossible to 'convert' a mediation agreement into an award, as that would require the reconsideration of the parties' dispute by the tribunal. Similarly, when tribunals face single-party arbitrations, the tribunal will not 'rubber-stamp claims presented to it'. Instead, it will make a 'determination of the party's claims', on which the default award will be based (Blackaby et al., 2015).

Arguably, consent awards do not satisfy the tribunal deliberation criterion, as they are designed only to record the parties' settlement. However, the arbitrators' signatures 'indicate a measure of approval by the arbitral tribunal to the parties' agreement', and therefore, deliberation exists (Blackaby et al., 2015). The arbitrators' signatures 'indicate a measure of approval by the arbitral tribunal to the parties' agreement', and therefore, that should be adequate deliberation (Blackaby et al., 2015). The fact that there is no reported case law with disputed consent awards confirms that parties choosing to record their settlement in an award instead of, for example, a mediation agreement, intend to be legally bound by it (UNCITRAL Secretariat Guide, 2016).

## *Awards must dispose wholly or partially of a dispute*

As Jaramillo (2011) observed, it was contested whether awards are exclusively decisions dealing with all matters of the dispute, thus rendering the tribunal entirely *functus officio* or any decision settling substantive issues. Today, the popular opinion is that awards need not deal with the entirety of the dispute; it suffices that they finally settle at least one substantive issue, 'leading to the end of the arbitral proceedings' (Gaillard and Savage, 1999). The shifting towards an extended scope of the notion of the award is observed in the reserved position adopted in an older edition of Blackaby et al. (2009) contrasted to the definition in the latest one. Whereas the older definition held that awards must render the tribunal *functus officio* (Blackaby et al., 2009), the latter edition recognises as awards 'any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure' (Blackaby et al., 2015). Therefore, a tribunal can be rendered *functus officio* regarding a particular claim to produce a final and binding, partial award without being fully discharged of its duty to arbitrate the entirety of the dispute.

## *The dispute must be substantive and be resolved in a final manner*

*Substantiality of the dispute and form requirements.* As was put in *Inforica Inc. v. CGI Information (2009)*, arbitral awards deal with substantive rights, whereas procedural decisions' serve to ensure that the parties would be governed by the rules of the game' (Born, 2014). As Born (2014) confirmed, 'a procedural order is aimed at the conduct of the arbitration' while an arbitral award strictly resolves substantive issues in a final manner. In practice, the line between substantive issues and procedural orders is often far from clear.

It has prevailed that a decision's label is not always indicative of its nature (Born, 2014). In *Brasoil v. Authority of the Great Man-Made River Project (1999)*, it was confirmed that an award could be disguised as an 'order' (Blackaby et al., 2015). In the circumstances, it sufficed that a decision is an award, notwithstanding its terminology, if it is reasoned and is the product of the tribunal's exercise of authority (Gill, 2008; Blackaby et al., 2015). These criteria were later reaffirmed in *Groupe Antoine v. Republic of Congo (2006)*. Similarly, in *Publicis Communications v. True North Communications (2000)*, the U.S. Federal Court stated 'it would be an "extreme and untenable formalism"' to not recognise and enforce awards disguised as other tribunal decisions. Considering that the New York Convention 'does not bestow transcendental definition on the term', it is the 'content of a decision, not its nomenclature, that determines finality' (Gill, 2008). In *Asurasu Jasa Indonesia v. Dexia Bank (2006)*, Chan Sek Keong CJ found that 'the mere titling of a document as an award does not make it one' and that 'it is the substance and not the form that determines the true nature of the ruling'.

In *ZCCM Investment Holdings v Kansanshi Holding (2019)*, Cockerill J distinguished between the substantive and procedural issues, finding that substantive matters 'are likely to be dealt with in the form of an award' (*ZCCM Investment Holdings v. Kansanshi Holding, 2019*). Indeed, the matters dealt with in an award are significant in that decisions about them substantially alter the parties' rights and liabilities in the arbitration. This power of influence is observed in decisions about substantive matters, as opposed to decisions of a procedural nature, which aim at regulating the process rather than the parties and their actions.

Cockerill J also confirmed that weight should be given to the substance over the form, stating that 'the Court will certainly give real weight to the question of substance and not merely to form'. However, the Court steered clear from adopting a side in the substance over form debate by stating that 'the arbitral tribunal's own description of the decision is relevant' and adding the further criterion of how 'a reasonable recipient of the tribunal's decision would have viewed [the award]' (*ZCCM Investment Holdings v. Kansanshi Holding, 2019*). While maintaining a typical balance between substance and form, the listed elements in the Court's reasoning are likely to be attached to different weights in future cases, functioning as a guide rather than fixed rules. The approach mentioned above was confirmed in *K v. S (2019)*, where Cooke J found the decision not to be an award because it has not 'determined any matter of substance' and not referring to its form throughout the judgement. It is yet inconclusive if and how the reasonable party test will be put at use; the standard could serve as a fair and equitable solution if the decision in question does not deal squarely with a substantive matter but fulfils other relevant criteria.

*Finality as a prerequisite in arbitral awards.* *Res judicata* is the rule according to which a matter that has already been decided upon cannot be decided again in fresh proceedings (in any adjudication method), and that the parties bound by a decision having acquired *res judicata* must, in good faith, fulfil their obligations (Jaramillo, 2011). The 'final' effect of awards is reflected in the narrow, exhaustive grounds the New York Convention prescribes for the non-recognition of awards (Born, 2014). For a decision to acquire *res judicata*, and effectively, be an award, it must 'finally resolve essentially substantive issues' of the arbitration (Born, 2014). The element of finality should be the most decisive distinguishing factor between an award and other tribunal decisions, as it affords the beneficiary the utmost protection of their right.

It is safe to conclude that finality is a requirement that the majority agrees upon (Hill, 2018). The gravity of finality is stressed in numerous cases. In *ZCCM Investment Holdings v. Kansanshi Holding (2019)*, a pivotal factor was whether the decision renders the tribunal *functus officio* for at least one matter in dispute. Accordingly, the French Supreme Court in *Groupe Antoine v. Republic of Congo (2006)* added to the grounds earlier laid by *Brasoil v. Authority of the Great Man-Made River Project (1999)* that the distinguishing factor between awards and other decisions is that awards 'resolve in a definitive manner (…) the dispute or lead to put an end in the proceedings' (Blackaby et al., 2015). For the Swiss Federal Tribunal in *X v. Y (2010)*, the differentiating point between awards and orders was not their content but whether they bear finality (Born, 2014). In *Diag Human Se v The Czech Republic (2014)*, the High Court of England and Wales refused recognition because the award was under review and, therefore, its finality was compromised. According to Elder J, the deficiency the award was being reviewed for 'can be cured retrospectively and is ultimately a matter for the review tribunal' (*Diag Human Se v. The Czech Republic*, 2014).

*Interim awards and the interrelationship of substantiality and finality.* The requirements of substantiality and finality are not interdependent. As observed above, finality plays a more significant role in elevating a tribunal decision into an award. Therefore, decisions not purely of substantive nature may be awards if they are final, whereas decisions of substantive nature cannot be awards unless they are also final.

Decisions, either of substantive or procedural nature which 'put an end to the arbitral proceedings', relating to one or more substantive issues of the claim, are different from 'mere procedural orders that can be modified or set aside during the arbitration' (Born, 2014; *X v. Y, 2010*). Whereas the first can effectively be recognised as an award, the latter cannot. The Zambian Arbitration Act (2001. s. 2(1)) also adopts a broad view of awards, to explicitly include any 'decision of an arbitral tribunal on the substance of a dispute and includes any interim, interlocutory or partial award and on any procedural or substantive issue' (Hill, 2018). Blackaby et al. (2015) also include procedural decisions in the definition of awards if these are termed as such by the tribunal. However, national courts and some commentators seem to agree that the absence of finality generally deprives a decision from the award status, even if the matter is partly substantive (Hill, 2018). This is demonstrated in the fierce debate around interim orders and their status as awards. By definition, the interim award has an 'expiration date' and is only valid until revoked or reversed by an award that is final. The characteristic of the temporariness of interim awards has provoked criticism that they should not be classified as such because they lack finality (Hill, 2018). As Lee J explained in *Resort Condominiums International Inc. v Bolwell (1995)*, the decision was not an award because it was 'provisional only' and 'liable to be rescinded, suspended, varied, or reopened by the tribunal which pronounced [it]'.

The national arbitration legislation and practice holding that interim awards should not have an award status are equally counterbalanced by legislations and commentators adopting a 'sufficiently expansive approach' to include interim awards (Born, 2014; Hill, 2018). For instance, there are several United States cases where interim measures qualified as awards. In *Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation (1991),* Wiggins J adopted a 'less stringent' approach to finality, which was subsequently criticised as non-observing the majority's strict approach (Hill, 2018). Indeed, recognising the existence of any type of interim awards and especially those of mere procedural nature could be contra to the New York Convention's spirit. As was observed in *Resort Condominiums International Inc. v. Bolwell (1995),* such expansionism would be against Article II of the Convention, which places the arbitration agreement at the heart of the arbitral process (Hill, 2018). As per Lee J, an award concerns 'the subject matter of the dispute referred by the parties to arbitration for resolution, rather than to some interlocutory or procedural direction or order which does not resolve the disputes referred' (Hill, 2018; *Resort Condominiums International Inc. v. Bolwell, 1995*).[5]

It is ultimately a question of whether a 'less stringent approach to finality' fulfils the purpose of arbitral awards to protect the rights of the beneficiary in the most effective way. The majority is reluctant to view finality in a relative context, although it has been recognised that 'the term "final" can be understood in a number of ways' (*Perusahaan Gas Negara v. CRW Joint Operation, 2015*). However, including specific interim awards under the New York Convention fulfils a gap. As Hill (2018) observed, often, arbitration could be 'an exercise in futility' without the rapid enforcement of interim measures, which in practice is as vital 'to the parties' rights (…) as a monetary award'. Therefore, the ad-hoc approach mentioned by Hill (2018); 'whether an interim measure is an award depends on the precise circumstances in which the question is posed', translates better to a unitary

approach of the concept of arbitral awards in the context of the New York Convention and the purpose of international arbitration in general. This approach is further reinforced by the unsystematic method adopted by Born (2014) in considering the definition of the award in his work and acceptance of relative finality, as it suffices that an interim measure is an award if it 'finally disposes of a request for relief' (Hill, 2018).[6] Born's (2014) approach was endorsed in *Perusahaan Gas Negara v. CRW Joint Operation (2015)*, where Menon CJ held that interim awards are final and binding because they settle a preliminary issue tightly connected to the substantive claims and leading to 'disposing of a portion of the parties' claims, although a final decision about them is not made'.

## Conclusion

The New York Convention is undeniably a manifestation of states willing to promote international unity and has struck an unprecedented balance between them. Although the absence of a definition of arbitral awards might be viewed as coincidental, it is not; it highlights the importance and power of this document in the modern international trade arena. While a fixed definition could provide a certain degree of harmonisation, that would not solve the underlying issue of divergent interpretations, whose root is diametrically opposed policy, translating in varying readings of the concept of the arbitral award in particular and arbitration laws in general.

According to the author of this paper, no definition of arbitral awards is required; its existence would not change the ideological differences among states nor make the situation less susceptible to divergent interpretations. Nevertheless, the New York Convention has provided tools for evolving the concept of the arbitral award and its entire text. It is up to national courts, arbitrators and scholars interpreting the New York Convention to treat peculiar dicta as obsolete, instead endorsing the popular view. While such activism by national courts would in no case constitute an international *stare decisis,* it would refine rulings interpreting the New York Convention. Further, it is positive that international arbitration practice has observed that idiosyncratic interpretations are recognised as such, while on multiple occasions, the judicial and non-judicial dialogue has swayed interpretation of the New York Convention towards the popular view. Ultimately, effective taxonomy and setting clear thresholds and criteria that constitute awards, considering those in the broader context of the Convention and the majority view, can lead to the successful and continuing development of the term and arbitration law.

### Acknowledgements

I would like to express my gratitude to Dr Patricia Živković, whom I was lucky to be taught by at the University of Aberdeen, in the area of international commercial arbitration. Dr Patricia's work ethic, expertise and passion for international arbitration have inspired me to not only author this work but to pursue a career in the sector.

### Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

### Funding

The author received no financial support for the research, authorship and/or publication of this article.

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## Notes

1. See also Hill (2018) for an explanation of the difference between *lex ferenda* and *lex nata.*
2. The same issue exists with other legal terms under the New York Convention. For instance, 'public policy' under Article V(1)(e) of the New York Convention has received divergent interpretations; Lee J in *Resort Condominiums International Inc. v Bolwell (1995)*, who found at [44] that Article V(1)(e) – the public policy ground, allowed 'residual discretion' to national courts to refuse recognition and enforcement of awards *cf.* Tijam J in *Mabuhay Holdings Corporation v. Sembcorp Logistics Limited, (2018)* who found, at [C] that:

   > mere errors in the interpretation of the law or factual findings would not suffice to warrant refusal of enforcement under the public policy ground. The illegality or immorality of the award must reach a certain threshold such that, enforcement of the same would be against [the Philippines'] fundamental tenets of justice and morality, or it would blatantly be injurious to the public, or the interests of the society.

3. Schwenzer and Hachem advance this argument in the context of inconsistent interpretations of the CISG, in response to criticism that several legal concepts, such as good faith, are not properly defined.
4. The Italian *arbitrato irrituale* is probably an exception.
5. Lee J raises valid points; however, the dicta should be read considering the localised prism the judge made them through (Hill, 2018).
6. Taking as a premise that the arbitral award is a unitary concept in the context of the arbitral legal order, Born considers the different approaches of national courts and other commentators and concludes in a similar way to Gaillard (2013): considering rules that are 'widely recognised' and rules which are 'idiosyncratic' (containing national peculiarities), endorsing the first and rejecting the latter. This method of building legal theory is rooted in the 'arbitral legal order' theory of arbitration (Gaillard, 2013).

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# Role of State Courts in supporting Arbitration

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## Contents

# Introduction

The word "support" can be interpreted in two slightly different ways. On the one hand, support can be used to refer to a subjective desire or attachment – in the sense that one would support a football team. On the other hand, it can mean providing assistance. It is principally the second of these uses that is applied in this chapter. However, the extent to which a court might consider itself able to provide assistance may depend upon an individual judge's willingness to support arbitration. As the analysis that follows demonstrates the availability of supportive measures and the supportive attitude of a particular jurisdiction plays an important role in the ostensibly voluntary compliance with the various obligations in the context of an arbitration. Whilst it could never be proven, it does not seem unreasonable to assume that the mere existence of court based supportive powers go a long way to preventing those parties which might be pre-disposed to adopting guerrilla tactics from actually doing so.

Any discussion of the role of state courts in supporting arbitration has the propensity to become parochial at an early and unhelpful stage. It is a discussion that can provoke strong views and the parochialism is found on both sides. For those who favour arbitration there can be a tendency to assume that state courts must (almost blindly) assist arbitration as well as simmering incredulity at the thought that this may even be questioned. For those who do not favour arbitration, there is a feeling that arbitration is a threat to the proper legal order and therefore challenges the sovereign authority of courts. Fortunately, it can be said of most jurisdictions, that this debate has reached a level of maturity where there is a recognition that the relationship can be a symbiotic one. In the biological sciences, symbiotic relationships are commonly classified into three types – mutualism, commensalism, and parasitism. Only the first two are relevant here. Mutualism, in the current context, implies that arbitration and state courts have a mutually beneficial relationship; commensalism on the other hand would suggest that arbitration benefits from its relationship with state courts, while state courts are neither benefited nor diminished by the relationship. For present purposes it is not necessary to resolve which is more accurate, save to note that, at a minimum, the relationship is a commensalist one. This reflects the approach and perspective from which this chapter is written. The chapter begins, for context, with a relatively brief consideration of the evolution of judicial attitudes to arbitration. The chapter then identifies a number of practical circumstances during which recourse is often made to the state courts by parties to an arbitration for support.

## Historical attitudes and context

The source of authority of an arbitrator/arbitral panel, and its doctrinal basis, is not the principal concern of this chapter.[1] However, a brief discussion does serve to provide useful

[1] X-ref to elsewhere in book

context to the competing views on the relationship of arbitral tribunals vis-à-vis state courts. The parochial and strong views alluded to above are often informed by particular leanings on this issue.

At its simplest there are two competing theories. The first is broadly allied to the traditionalist theory of arbitration. That theory posits that the true source of an arbitrator's authority is an exercise of sovereign power from within a State. The State through its organs, like a parliament, makes laws that permit and legally recognise arbitrations conducted within that territory; subject to certain pre-conditions, such as the presence of party consent evidenced by an arbitration agreement. In other words, the legal legitimacy of an arbitration is owed to the existence of a *lex arbitri* of the seat of arbitration, which itself is the result of an act of sovereign power. The logic to this argument extends to setting the circumstances and conditions in which an arbitrator's authority would be removed or in other ways disavowed – for example by setting aside an award. The ability of a domestic court at the seat to set aside an award is found in most, if not all, jurisdictions. In essence, what the state provides, the state can take away. There is a very clear hierarchical power dynamic in this relationship. Courts, as an organ of the State, implicitly therefore have a supervisory and corrective role. This implicit characterisation of the courts' role is easily supported by reference to examples. The corrective power has already been mentioned in the context of setting aside an award. The supervisory power can be seen in jurisdictional reviews. This can be described as supervisory rather than corrective, because negative jurisdictional findings are rarely capable of review.[2]

The second theory sits comfortably alongside notions of the delocalisation of arbitration, and particularly the ideas of state-society liberalism that arguably underpin delocalisation.[3] Proponents of this view see the authority of an arbitrator stemming from the agreement of the parties. However, it would be somewhat misleading to follow this with an observation that nothing more is needed, because that would mischaracterise the view.[4] The supreme power givers are the (legal) persons who have voluntarily consented to the arbitration process. Those who associate with this theory see the courts almost as a mere service provider, there only to facilitate the will of the individual. The power dynamic is perceived very differently. When parties to an arbitration attend court, they are doing so as customers, and the customer is always right.

The above descriptions deliberately reflect extremes, and the reality of any given situation is almost certainly more nuanced and balanced. However, they serve an important point. There

[2] S. Kroll "Recourse against Negative Decisions on Jurisdiction", Arbitration International, Vol 20 No 1 (2004); A Crockett, D Mills, "A Tale of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings" Kluwer Arbitration Blog (November 8, 2016) <http://arbitrationblog.kluwerarbitration.com/2016/11/08/a-tale-of-two-cities-an-analysis-of-divergent-approaches-to-negative-jurisdictional-rulings/>.

[3] *See* S. Greenberg *et al.*, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2011), para. 2.55 – 2.62.

[4] See for instance J Paulsson,'Delocalisation of International Commercial Arbitration: When and Why it Matters', (1983) 32 International and Comparative Law Quarterly 53, noting at 57 *"What this critique misses is that the delocalised award is not thought to be independent of any legal order. Rather, the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin."* .

is an important link to be made between attitudes regarding the role state courts play in supporting arbitration and the prevailing political discourse (and system of government) in any particular state.

There are many forms of court involvement with international arbitration; according to the Model Law and the New York Convention there are specific stages when courts are most likely to be involved in an international arbitration. These are:

(1) prior to the establishment of the arbitral tribunal;

(2) upon commencement of the arbitration;

(3) during the arbitration process and

(4) at the enforcement of the arbitration award.[5]

The fourth of these is not within the scope of this chapter.

From the perspective of the English language, the choice of words used in statutes to describe the relationship between the courts and arbitral proceedings could be described as antagonistic. The word 'intervene' is often used when describing the extent to which a court can become involved.[6] However whilst not technically bearing this meaning, intervene can have a supervisory, or superior connotation.

## Procedural questions

### The finality of a decision

By way of further context, there are several overarching procedural positions that courts commonly adopt which can be described as being supportive of arbitration.

One such position that relates to a number of the decisions referred to throughout the body of this chapter, is that the court's decision cannot be reviewed. An example considered below concerns the appointment of arbitrators. In that particular instance the finality of the decision is noted in the instrument.[7] However restrictions on the grounds of appeal may also be found

[5] Commentators have pointed out that there are four stages of courts' involvement in the arbitration process, *see, e.g.,* J. D. M. Lew, 'Does National Court Involvement Undermine the International Arbitration Process?', *American University International Law Review*, 24(3) (2009), 489 and A. Redfern *et al.*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015), Ch. 7, 415-40.

[6] *See*, as a sample, including non-UNCITRAL Model Law examples: Australian International Arbitration Act (1974), Schedule 2 Article 5; Austrian Arbitration Act (2013), Section 578; Azerbaijan Arbitration Law (1999), Article 5; Bangladeshi Arbitration Act (2001), Section 7; Barbados International Commercial Arbitration Act (2007), Section 8; Bermuda International Conciliation and Arbitration Act 1993, Article 5; Cambodian Commercial Arbitration Law, Article 5; English Arbitration Act (1996), Section 1; German Code of Civil Procedure (1998), Section 1026; Indonesian Arbitration Act (1999), Article 3; Myanmar Arbitration Law (2016), Article 7; Nepalese Arbitration Act (1999), Article 39; Norwegian Arbitration Act (2004), Section 6; Paraguayan Arbitration Law (2002), Article 8; Serbian Arbitration Act (2006), Article 7; Turkish International Arbitration Law (2001), Article 3.

[7] UNCITRAL Model Law on International Commercial Arbitration Article 11(5).

in a variety of sources in each jurisdiction; ranging from the court's rules of procedure, through to the legislative instrument that establishes the court.

## The level of consideration

Another procedural position courts frequently need to consider concerns the level of review they undertake. Does the court need to undertake a full judicial investigation and reach a definitive determination, or can it be satisfied with a *prima facie* review? For example, whether a court should undertake a full judicial review or merely apply a *prima facie* test to the existence of an arbitration agreement is often keenly debated.[8] There are persuasive arguments on both sides. However, it is not necessarily just a policy question, the approach may also be effectively determined by the structure of the legal system, and the technical legal consequences of finding an arbitration agreement in existence. In Common Law countries the result is that the action is 'stayed'. This says nothing about the claim itself, it is in effect merely a procedural, albeit potentially permanent, hold. In other jurisdictions though, predominantly Civil Law countries, the outcome can be to dismiss the claim by determining that it is inadmissible. Germany provides an example of that situation.[9]

It is difficult to make any broad yet firm statements about which jurisdictions follow which approach. On balance, the academic commentary, policy arguments, and decided cases tend to favour *prima facie* review.[10] However, whilst any individual jurisdiction would need to be checked, certain guiding thoughts can be provided. First, if the consequence of the court's consideration results in a substantive action (such as the dismissal of the claim, or declarations of invalidity, etc.) then there is a greater likelihood that a full review will be undertaken. Second, particularly in the context of Common Law jurisdictions, there appears to be something of an east/west divide. Singapore[11] and Malaysia[12] (indicative of the Asia

[8] see as an example of the discussion on this issue: Manuel Penades & Pedro Tent Alonso, 'The New York Convention and the Enforcement of Arbitration Agreements by National Courts: What Level of Review?' in Fach Gómez K, López Rodríguez AM (eds) 60 Years of the New York Convention: Key Issues and Future Challenges, Wolters Kluwer, 2019.

[9] *See* S. Kröll, 'National Report for Germany (2018)', in J. Paulsson and L. Bosman (eds.), *ICCA International Handbook on Commercial Arbitration* (Kluwer 1984, Supplement no. 98, March 2018), 1-70, 20, citing German Federal Supreme Court (*Bundesgerichtshof*), 13 January 2005 – III ZR 265/03, SchiedsVZ 2005, 95 = NJW 2005, 1125.

[10] *See* Greenberg *et al.*, *International Commercial Arbitration* (2011), para. 5.87.

[11] *See* M. Hwang *et al.*, 'National Report for Singapore (2018)', in Paulsson and Bosman (eds.), *ICCA International Handbook on Commercial Arbitration* (Supplement no. 99, June 2018), 1-55, 16, citing *Tomolugen Holdings Ltd* v. *Silica Investors Ltd* [2016] 1 SLR 37 and *Wilson Taylor Asia Pacific Pte Ltd* v. *Dyna-Jet Pte Ltd* [2017] SGCA 32.

[12] *See* L. Wee *et al.*, 'Malaysia Country Update', *Asian Dispute Review*, 20(2) (2018), 88-96, 89, citing *Press Metal Sarawak Sdn Bhd* v. *Etiqa Takaful Bhd (FC)* [2016] 5 MLJ 417: '[Malaysian courts] should lean more towards granting a stay pending arbitration under s 10(1) of the 2005 Act, even in cases where there is some doubt about the validity of the arbitration clause or where it is arguable as to whether the subject matter falls within or outside the ambit of the arbitration clause.'

Pacific region[13]) only undertake a *prima facie* review, whereas England[14] and Ireland[15] both undertake a full review. Finally, it should also be noted that the level of review may vary depending on whether the arbitration is seated within that jurisdiction or elsewhere.

Relevant to either approach, but particularly to that of full judicial consideration, is the question of what law should be applied when making the determination. The question of applicable law with respect to any aspect of international arbitration is almost inevitably vexed and difficult. In this instance, the focus is not on the substantive law governing the arbitration agreement (though that can be relevant), but rather potentially differing descriptions of what constitutes an arbitration agreement within the same jurisdiction. This may arise where the specific arbitration law of a country has a slightly different definition to that found in the New York Convention. It has been noted, for example, that the relevant provisions in the Dutch Arbitration Law[16] are less strict than those in the New York Convention,[17] and that accordingly the Dutch courts might utilise Article VII of the Convention to apply the more lenient provisions of their own law.

## Emergency relief

The final overarching contextual observation to be made concerns the urgency with which a party may seek to act. Urgent issue requiring emergency relief may arise at any time during, or even before arbitral proceedings have commenced.

Historically, emergency relief sought before the composition of a tribunal could have only been sought before a court. However, the relatively recent past has seen some institutional rules provide for emergency relief, through the notion of an emergency arbitrator. Fundamentally the possibility of emergency arbitrators has not changed the supporting role courts can play in these matters. Courts will either be called upon to enforce interim measures issued by the tribunal or to consider and grant those measures themselves.

Where parties have chosen arbitral rules which include provision for an emergency arbitrator, a strategic decision will need to be made. The first, and perhaps most important, nuance to consider is the level of coercive powers that an arbitrator or a national judge has. In this respect, although an emergency arbitrator lacks coercive powers, their decision is binding between the disputing parties.

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[13] Greenberg *et al.*, *International Commercial Arbitration* (2011), paras. 5.58-5.89.
[14] M. Kotrly and B. Mansfield, 'Recent Developments in International Arbitration in England and Ireland', *Journal of International Arbitration*, 35(4) (2018), 481-96.
[15] *Sterimed Technologies International Ltd.* v. *Schivo Precision Ltd.*, [2017] IEHC 35; *Lisheen Mine* v. *Mullock and Sons (Shipbrokers) Ltd.*, [2015] IEHC 50; *see* also M. Kotrly and B. Mansfield, 'Recent Developments in International Arbitration in England and Ireland', *Journal of International Arbitration*, 35(4) (2018), 481-96.
[16] Articles 1022(1) or 1074(1) Dutch Arbitration Law.
[17] G. Meijer and M. R. P. Paulsson, 'National Report for The Netherlands (2018)', in Paulsson and Bosman (eds.), *ICCA International Handbook on Commercial Arbitration* Supplement no. 98, March 2018), 1-74, 22.

In addition, there are other incidental nuances that need to be considered such as the specialist knowledge of the emergency arbitrator. For example the emergency arbitrator may be an expert in the law applicable to the merits of the dispute; whereas a foreign judge in a foreign court may have limited expertise in that law.[18]

However, it is also conceivable that a supportive court may see its jurisdiction restricted if the parties could seek relief through an emergency arbitral proceeding. As is noted in the context of special actions to enforce an arbitration agreement discussed below, there is English authority that indicates courts should not step in if an arbitral tribunal is already invested with the same power.

## Supporting an arbitration prior to its commencement

### Enforcing a valid arbitration agreement

The first and most straightforward step in support of an arbitration that a court can take is to recognise and enforce the existence of an arbitration agreement. This is usually mandated in the *lex arbitri.* Article 8 of the UNCITRAL Model Law provides a standard example:[19]

> *Article 8. Arbitration agreement and substantive claim before court*
>
> *(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
>
> *(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*

[18] Redfern *et al.*, *Redfern and Hunter* (2015), 426.

[19] *See*, as a sample, including non UNCITRAL Model Law examples: Afghanistan Commercial Arbitration Law (2007), Article 15; Albanian Code of Civil Procedure (1991), Article 414; Austrian Arbitration Act (2013), Section 584; Barbados International Commercial Arbitration Act (2007), Section 11; Belgium Judicial Code (2013), Article 1682; Belize Arbitration Act (2000), Section 26; Bermuda International Conciliation and Arbitration Act 1993, Article 8; Civil Procedure Code of the Federation of Bosnia and Herzegovina (2003), Article 438; Brunei Arbitration Order 2009, Article 6; Cambodian Commercial Arbitration Law, Article 8; Chinese Arbitration Law (1995), Article 5; Columbian Arbitration Law, Article 70; English Arbitration Act (1996), Section 9; French Code of Civil Procedure (2011) Article 1448; German Code of Civil Procedure (1998), Section 1032; OHADA States Uniform Act on Arbitration, Article 13; Serbian Arbitration Act (2006), Article 14; Slovakian Arbitration Act (2002), Section 2; The Netherlands Arbitration Act (1986), Article 1022; Trinidad and Tobago Arbitration Act (1939), Section 7; Turkish International Arbitration Law (2001), Article 5; Tuvalu Arbitration Act (2008), Section 5; Vietnamese Ordinance on Commercial Arbitration (2003), Article 5; Yemeni Arbitration Act (1992), Article 19.

Two matters immediately stand out with regard to this provision. The first is the obligatory nature of the wording used – 'shall'. The court is *obliged* to refer the parties to arbitration unless it finds that the agreement is 'null and void, inoperative or incapable of being performed.' That condition is the second notable matter in the provision. The very wording of the legal text is clearly intended to enable arbitration to draw upon court support. Similar wording is found in Article II(3) of the New York Convention; which is preceded by an explicit obligation to recognise the arbitration agreement in Article II(2).

Despite the seemingly clear wording there remain several contentious elements about which courts may be asked to make determinations. It is often the way courts respond to these questions that leads to descriptions of jurisdictions as being 'pro-arbitration' (supportive) or 'unfriendly' (unsupportive). First, the court will need to determine that there is in fact an arbitration agreement. As noted above there is a question of what standard of investigation the court should apply in this process: full judicial consideration or only a *prima facie* review? Second, even if there is an arbitration agreement, is it 'null and void, inoperative or incapable of being performed'? Third (intertwined but distinct), does the matter before the court fall within the scope of the arbitration agreement? Fourth, if there are multiple matters, what if some fall within the scope of the agreement and some do not? Fifth, what should be done where there are multiple parties, some of whom are not party to the arbitration agreement?

## Special actions

The scenario described in the Model Law extract above is in essence a reflexive action of support – the party wishing to assert the arbitration agreement is typically the respondent in a court proceeding and has raised the arbitration agreement in order to halt those proceedings. However, in some jurisdictions, courts are able to provide support to the "pro-active" party wishing pursue arbitration. §1032(2) of the German Code of Civil Procedure (ZPO) is a good example, this provision allows the party wanting to rely on the arbitration clause to seek a declaration from the Court prior to the appointment of the arbitrators. The rationale is procedural economy,[20] and the decision has *res judicata* effect on subsequent courts proceedings[21] and in the prevailing view also the arbitral tribunal.[22] In contrast, in a 2016 decision the English high Court took a different view of whether court's should assist in this manner. In the *HC Trading Malta Ltd v Tradeland Commodities S.L.*[23] decision an application for declaratory relief confirming the existence of an arbitration agreement was refused. The view taken was that there was no need for such a declaration, as the tribunal was capable of determining the issue. Whilst entirely different outcomes, each of these

[20] See P Huber, I Bach "*§1032*" in K. Bockstiegel, Stefan Kröll, Patricia Nacimiento, Arbitration in Germany. The Model Law in Practice (2nd ed), (Wolters Kluwer 2015), §1032 para 43.
[21] Huber/Bach, "*§1032*", §1032 para 57.
[22] Huber/Bach, "*§1032*", §1032 para 58.
[23] [2016] EWHC 1279 (Comm).

scenarios can be seen as supporting arbitration in their own way. The German approach facilitates an easier pathway to arbitration, whereas the English approach recognises the authority and powers of an arbitral tribunal.

## The existence of an operative arbitration agreement

The meaning of 'null and void, inoperative or incapable of being performed' is not entirely clear. It has been noted that although the phrase is found in both the New York Convention and the UNCITRAL Model Law no standard or further explanation of the phrase is to be found in those or related documents.[24] Notwithstanding this, it appears that most states that have adopted the Model Law have included the phrase.[25]

Since those observations, an UNCITRAL Working Group has however had cause to consider the expression 'null and void' in a slightly different context, namely the 2010 revision of Article 21 of the UNCITRAL Arbitration Rules 1976.[26] The discussion was an extensive one[27] during which it was noted that 'null and void' was an expression used in both the New York Convention and the UNCITRAL Model Law. Ultimately, the decision of the Working Group was to only use the term 'null' in the revised Rules. It was stated:

> that the word 'null' was wide enough to cover all contractual defects. That deletion, it was further said, would align the English version with other language versions of that paragraph and promote broad interpretation of the concept of defects of a contract. [28]

Curiously, although the expression 'null and void' is used in both Article 8 and Article 16 of the English version of the UNCITRAL Model Law, differing terms are used in the French version. In the French version 'caduque' (Article 8) and 'nullité' (Article 16) are used. In practical terms there may be little consequence. A potentially 'unsupportive' interpretation could be that it indicates the correct time at which to consider the validity of the arbitration agreement – namely the time at which it is being relied upon to initiate an arbitration. Although not a perfect analogy 'caduque' is more akin to what a Common Law lawyer would associate with a 'voidable' contract.

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[24] P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd ed. (Sweet & Maxwell, 2010), para. 2-087.

[25] Binder, *International Commercial Arbitration and Conciliation* (2010), para. 2-087, highlighting Egypt, India, Oman and Sri Lanka as examples of countries that have omitted the phrase.

[26] Article 21 (now Article 23 in the 2010 Rules), like Article 16 of the UNCITRAL Model Law addresses the doctrine of separability, and the concerns regarding 'null and void' are in reference to the main contract.

[27] For an elaboration of the discussion *see* C. Croft *et al.*, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013), paras. 23.10-23.13, noting specifically the decision in *Harbour Assurance Co. (UK) v Kansa General International Insurance Co,* [1993] QB 701 (CA), [1993] 1 Lloyd's Rep 455 (CA). *See* UNCITRAL Working Group II, 50th session (9-13 February 2009, New York), UN Doc A/CN.9/669, paras. 40-42. Logically, a void contract is a paradox because if it is void in the strict sense of the word there was never any contact in the first place: *see Fawcett* v. *Star Car Sales Ltd* [1960] NZLR 406 (CA) at 412 (Gresson P); and *Ingram* v. *Little* [1961] 1 QB 31 (CA) at 55 (Pearce LJ).

[28] Working Group II, 50th session (9-13 February 2009, New York), UN Doc A/CN.9/669, para 42.

## The scope of the arbitration agreement

Interpreting the scope of an arbitration agreement is a topic that has been considered elsewhere in this book.[29] For the purposes of this chapter, the critical observation is that this is an issue where a judge's personal attitude and their degree of 'support' for arbitration can play a part. When courts are called upon to interpret an arbitration agreement, they are essentially being asked to consider two questions. First, is the matter something that the *lex arbitri* permits to be determined by arbitration ('objective arbitrability'); and, if yes, did the parties agree as between themselves to refer the matter to arbitration? One should always assume that a judge will appropriately apply the law in all these instances, however the law may permit broader or narrower interpretations.

This topic is of interest to this chapter because of the manner in which a court may handle particular instances of this issue. For example, the parties may have a valid and enforceable arbitration agreement, but not all the issues in dispute between them are encompassed within it. In some instances, it may be possible to address this through a broad interpretation approach,[30] however in other instances, it will be clear – the parties have clearly decided to arbitrate some issues, but have not (yet) made the same commitment to each other about other issues. The seemingly obvious outcome of a situation such as this would be for the court to refer those issues encompassed by the arbitration agreement to arbitration, and allow the 'non-arbitral' issues to be pursued in court. The simplicity of this statement belies the difficulties it would produce – parallel proceedings are always complex, usually time-consuming, and more expensive in any context. Courts have responded to this topic in a variety of ways. There are examples of where the court has determined it should keep control of all issues notwithstanding the arbitration agreement on the basis that it has a stronger obligation to protect against *lis pendens*.[31] There are other instances where courts appear to have taken the view that the claim was deliberately framed in a manner designed to, *inter alia*, circumvent the arbitration clause, and thus stayed the proceedings in favour of arbitration.[32]

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[29] X-ref to elsewhere in book

[30] see for example *Premium Nafta Products Limited v. Fili Shipping Company Limited* [2007] 2 All ER (Comm) 1053*, an appeal from Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951.

[31] *See*, further describing various examples in both international commercial and investment arbitration, B. M. Cremades and I. Madalena, 'Parallel Proceedings in International Arbitration', *Arbitration International*, 24(4) (2008), 507.

[32] *E.g.*, the Australian Federal Court decision of *Recyclers of Australia Pty Ltd & Anor* v. *Hettinga Equipment Inc & Anor* (2000) 175 ALR 725. *See* for further discussion in an Australian context M. Pryles, 'National Report for Australia (2018)', in Paulsson and Bosman (eds.), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 99, June 2018), 1-6; and discussing additional Australian examples M. Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005), 125, 167-8.

## Party to the arbitration agreement

The question of whether there is an operative and enforceable arbitration agreement presupposes, at least to a degree, a finding that the parties before the court are parties to the arbitration agreement. Where there are only two parties involved that matter is usually a straightforward determination, however where there are multiple parties, potentially with multiple and different arbitration agreements, the courts may be faced with difficult decisions. These circumstances again raise the issue of *lis pendens*, with both its legal and practical problems. One might assume that a court is faced with three possible options. The first is to refer arbitrable claims to arbitration and allow the non-arbitrable ones to proceed notwithstanding the complexity. Alternatively, the court may seize control of all matters, both arbitrable and non-arbitrable, so as to ensure that there is a coherent and co-joined manner of resolving the linked disputes. Or finally, the court may consider itself empowered to refer all the disputes and parties (even those not party to an arbitration agreement) to arbitration. In the last of these options, the court will be drawing upon its own generic powers, and not necessarily, those specifically related to arbitration. Many, indeed probably all, courts have discretionary powers relating to the management of a case. It may be open to the court to use these powers to direct the parties to undertake particular actions either prior to a court hearing, or potentially even *in lieu* of it. In effect, the court would be mandating a form of compulsory arbitration – a phrase sometimes described as oxymoronic.[33] There are instances where this approach, which is very clearly supportive of arbitration, has been taken.[34]

## Anti-suit injunctions

As noted by Schwebel and Lew, 'injunctions come in all shapes and sizes,' in the context of international arbitration there are anti-suit injunctions and pro-arbitration injunctions.[35] In the later case, the starting point is that when one of the disputing parties refuses to comply with the obligation to resolve a dispute in accordance with an arbitration agreement, there are a wide range of diverse mechanisms to enforce the arbitration agreement. One of these mechanisms is a pro-arbitration injunction,[36] this has the the effect of upholding the arbitral process by directing the recalcitrant party to participate in the arbitral process.[37]

In contrast, the nature of anti-suit injunctions issued by arbitral tribunals (as distinct from courts) is perhaps more debatable, in particular as to the finality of the relief.[38] In this respect,

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[33] *See*, for instance J. Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013), 19.

[34] *See*, for Singapore, M. Hwang *et al.*, 'National Report for Singapore (2018)', in Paulsson and Bosman (eds.), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 99, June 2018), 1-55.

[35] J. D. M. Lew, 'Anti-suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings', in E. Gaillard (ed.), *Anti-suit Injunctions in International Arbitration* (Juris, 2005), 499.

[36] O. Vishnevskaya, 'Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?', *Journal of International Arbitration*, 32(2) (2015), 173-214.

[37] *See, e.g.,* US Federal Arbitration Act, Sections 4 and 206.

[38] E. Gaillard, 'Anti-suit Injunctions Issued by Arbitrators', in A. J. van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (Kluwer, 2008), 235; L. Lévy, 'Anti-Suit Injunctions Issued by Arbitrators', in E. Gaillard (ed.), *Anti-Suit Injunctions in International Arbitration (IAI International Arbitration Series no. 2)* (Juris, 2005), 115-29.

Article 17(2)(b) of the UNCITRAL Model Law has referred to interim measures as 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, *inter alia*, to take, or refrain from taking, any action that would prevent, or is likely to cause, current or imminent harm or prejudice to the arbitral process. There are some arbitral rules that explicitly state that anti-suit injunctions can be issued in the form of a procedural order or an interim award.[39] For example, in ICC Case no. 16240, it was discussed that the main objective of anti-suit injunctions, from the perspective of the arbitration tribunal, is to prevent parallel proceedings, in order to avoid different proceedings from arriving at different outcomes.[40]

Some commentators have concluded that arbitral tribunals have, and should be prepared to exercise, the power to order a party not to pursue litigation in breach of its agreement to arbitrate.[41] For example, arbitral tribunals have sometimes issued orders forbidding a party from proceeding with or commencing litigation in a national court particularly because of the risk of inconsistent decisions in parallel and duplicative proceedings.[42] Trying to decode in more detail the nature of an anti-suit injunction, it could be said that an anti-suit injunction is directed against a party to the arbitration, not technically against the forum (*i.e.*, the arbitral tribunal) but rather against a disputing party which is taking steps that would violate its contractual obligations (*i.e.*, the arbitration agreement). However, in reality, the injunction affects the competence of a forum. Most importantly, anti-suit injunctions are controversial when issued by national courts, because they arguably involve the courts of one nation interfering with the judicial process in another nation.

Undertaking a more in-depth analysis of the supportive role of national courts, one could argue that the main objective of national courts should be to uphold the arbitration agreement, even when one of the disputing parties refuses to comply with its obligation to submit the dispute to an international tribunal. As briefly mentioned above, parallel proceedings between arbitral tribunals and national courts are often a possibility, this of course is an undesirable scenario in terms of procedural efficiency and potential risks, such as having different decision-makers deciding on the same disputed issues and rendering (potentially) different solutions. Anti-suit injunctions, either pro- or anti-arbitration, are then the remedy by which parties can restrain a national court or an arbitral tribunal from deciding on an already pending process. Hence, commentators have also highlighted that anti-suit injunctions are the genuine interconnection between the role of national courts and their support of the arbitration process.[43]

Anti-suit injunctions are well known in common law legal cultures and less popular in countries with a civil law tradition. Anti-suit injunctions have often been described as an

[39] Swiss Rules of International Arbitration, Article 26(2)(3).
[40] Vishnevskaya, 'Anti-suit Injunctions from Arbitral Tribunals' (2015), 178.
[41] G. B. Born, *International Commercial Arbitration* (Kluwer, 2014), Ch. 17, 2424-563.
[42] *RCA Global Commc'ns Disc, Inc.* v. *Islamic Repub. of Iran*, Award in IUSCT Case no. ITM 30-160-1 of 31 October 1983, 4 Iran-US C.T.R. 9, 11-2 (1983).
[43] *RCA Global Commc'ns Disc, Inc.* v. *Islamic Repub. of Iran*, Award in IUSCT Case no. ITM 30-160-1 of 31 October 1983, 4 Iran-US C.T.R. 9, 11-2 (1983). *See* also Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009), 489.

invention of English courts and are now widely recognized as an interim and final relief.[44] Nonetheless, as mentioned above, in civil law traditions, anti-suit injunctions are often challenged on the grounds that these measures interfere with the powers of another jurisdiction and the principle of access to justice.[45]

One of the most polarized issues in relation to anti-suit injunctions is the synergy of these measures to support international arbitration across different legal systems. To best illustrate this question, the CJEU case of *Allianz* v. *West Tankers* concluded that an anti-suit injunction in support of arbitration, which restrained a disputing party from pursuing any proceedings other than arbitration to resolve a legal dispute, was incompatible with Regulation (EC) no. 44/2001 ('Brussels I Regulation').[46]

In this case, a West Tankers vessel collided with a jetty owned by Erg. Erg sought compensation from Allianz (the insurer) and initiated arbitration proceedings against West Tankers in London for the excess of the insurance. Allianz also brought proceedings against West Tankers in Italian courts to recover the sums paid to Erg. In response, West Tankers brought court proceedings in England (Queen's Bench Division) to restrain Allianz from pursuing any other dispute resolution method than arbitration and stop the proceedings in Italy. The English Court issued an anti-suit injunction against Allianz to discontinue proceedings. In response, the English Court decision was appealed in the House of Lords, which then referred the dispute to the CJEU; it was argued that the injunction was contrary to the Brussels I Regulation. The CJEU concluded that anti-suit injunctions primarily breach the Brussels I Regulation and the principle of mutual trust across EU Member State national courts.[47]

More recently, in the *Nora Holdings Ltd* v. *Public Joint-Stock Co Bank* case, the English Commercial Court referred to the CJEU West Tankers decision as good law. The dispute relates to the termination of a set of loan and pledge agreements between Nora Holdings and Public Joint-Stock Co Bank.[48] Most termination agreements contained an arbitration agreement providing for LCIA arbitration seated in London and Cypriot law as applicable law. One of the termination agreements and the loan agreements, however, were subject to the Moscow 'Arbitrazh' Court. As stated by Nora Holdings, this was part of a commercial restructuring which will provide liquidity; while Public Joint-Stock responded that the bonds were worthless.

Public Joint-Stock started to seek the invalidation of the restructuring on behalf of the bank in Moscow courts under Russian insolvency law. At the same time, it also commenced Cypriot proceedings to annul the restructuring. Nori commenced proceedings in English courts seeking an anti-suit injunction to restrain Cypriot and Russian courts. Nori also initiated

[44] Lew, 'Anti-suit Injunctions Issued by National Courts' (2005), 499.
[45] Vishnevskaya, 'Anti-suit Injunctions from Arbitral Tribunals' (2015), 176 and *Phillip Alexander Securities* & *Futures Ltd* v. *Bamberger* [1996] C.L.C. 1757; [1997] Eu. L.R. 63; [1997] I.L.Pr.73, CA (Civ Div).
[46] CJEU, *West Tankers*.
[47] CJEU, *West Tankers*, para. 15.
[48] The effect of this contract was to replace the Bank's short-term loans secured by pledges of shares in a company which owned valuable Moscow real estate with long-term unsecured bonds.

arbitration proceedings seeking a declaration that the arbitration agreement has been validly terminated while also seeking another anti-suit injunction from the arbitral tribunal.

First, Public Joint-Stock argued that the fact that an arbitral tribunal could issue anti-suit injunctions is not a reason for the court to refuse to grant an injunction. When doing so, the court referred to the supportive role of national courts; when proceedings are brought in breach of an arbitration agreement, it would generally be appropriate to grant an anti-suit injunction pursuant to Section 37 of the Senior Courts Act 1981, unless there are strong reasons not to do so.[49] In deciding that there were no strong reasons against granting the anti-suit injunction, Males J distinguished arbitration agreements from exclusive jurisdiction clauses. In the case of the loan agreements, all were subject to the jurisdiction of the Moscow Court. The English Court concluded that it had discretion and was able to take account of factors such as *forum non conveniens*, thus there were no strong reasons to refuse the injunction restraining the Russian proceedings.[50]

In comparison, in relation to the Cypriot courts, the Commercial Court found that *West Tankers* was a valid authority under EU Law and concluded that it had no authority to grant an anti-suit injunction in respect of the Cypriot proceedings.

Other examples of the support of national courts in foreign-seated arbitration are well illustrated in a series of US cases which have considered the issue of granting an anti-suit injunction to redirect the parties to an arbitration process.[51] For example, in the *Paramedics Electromedicina Comercial Ltda (Tecnimed)* v. *General Electric (GE)* case, Tecnimed (a Brazilian company) and GE entered into a sales, service and distribution agreement, which contained an arbitration clause to resolved under the rules of the Inter-American Commercial Arbitration Commission ('IACAC').[52] A dispute arose between the parties; Tecnimed filed a lawsuit in Brazilian courts. Posteriorly, GE commenced an arbitration under the IACAC Rules, to which Tecnimed infomed that it would not participate as the dispute was not arbitrable. In response, Tecnimed filed a petition of a permanent stay of the arbitration in a New York state court. In the meantime, the arbitral tribunal found that all claims were arbitrable. Shortly thereafter, the New York Southern District Court considered that the GE claims were arbitrable as well as that the Tecnimed lawsuit in the Brazilian courts was within the scope of the arbitration clauses. The court granted an anti-suit injunction ordering Tecnimed to stop the litigation proceedings in Brazilian courts and requested Tecnimed and GE to draft a joint petition to dismiss the case in Brazilian courts. Tecnimed refused to sign the joint petition, upon which the District Court found Tecnimed to be in contempt and ordered it to pay US$ 1,000 for each day of non-compliance. The Court also requested Tecnimed to explain why the company should not be subject to further sanctions; Tecnimed ignored the request, the sanction increased to US$ 5000 per day and Tecnimed appealed the anti-suit injunction. The Second Circuit was asked to determine whether a court should grant an anti-suit injunction

[49] *AES Ust-Kamenogorsk Hydropower Plant LLP* v. *Ust-Kamenogorsk Hydropower Plant JSC*, [2010] 2 All ER (Comm) 1033, [2010] EWHC 772 (Comm), [2010] 1 CLC 519, [2010] 2 Lloyd's Rep 493.

[50] *Nori Holding Ltd & Ors* v. *Public Joint-Stock Company 'Bank Otkritie Financial Corporation'* [2018] WLR(D) 343, [2018] EWHC 1343 (Comm).

[51] For a very comprehensive review of these, *see* J. Fellas*,* 'Anti-Suit Injunctions', *Transnational Dispute Management*, 1 (2006), 1-34.

[52] *Paramedics Electromedicina Comercial, Ltda.* v. *GE Med. Sys. Info. Technologies, Inc.*, No. 02 Civ. 9369, 2003 WL 2364159 (S.D.N.Y. June 4, 2003), aff'd, 369 F.3d 645 (2d Cir. 2004).

'against parallel litigation.' It concluded that the threshold was satisfied as the resolution of the case before the enjoining court is dispositive of the action to be enjoined despite the fact that the two parties were not identical in both matters. Lastly, the Court also found that anti-suit injunctions are justified in two scenarios: (i) in case of a ground of public policy and (ii) to protect the jurisdiction of the rendering court. It found that both criteria were satisfied in this case.[53]

## Constituting / Filling a tribunal

From a functional perspective one of the most important ways that courts support the arbitration process is when they are needed to step in and appoint the arbitral panel. The importance and significance of this particular aspect of support cannot be understated.

The scenario is a fairly straightforward one. The parties have concluded a valid and enforceable arbitration agreement. The subject matter of the dispute is clearly arbitrable. The claimant party commences arbitral proceedings. The respondent party, not wanting to arbitrate, attempts to derail the arbitration by not participating in any way shape or form. As demonstrated by cases like the well-known *Dutco* decision,[54] the ability to participate in the appointment process is considered a fundamental right within arbitration. Arbitral rules are drafted in a manner which protects this right, for example, it is not possible for one party to appoint the entire tribunal. However, arbitral rules are also drafted to protect the integrity of overall arbitral process, and the right to participate in the appointment of the tribunal is one that can be delegated or waived. In an institutional arbitration, the arbitral rules of the institution would typically allow it to step in and make the necessary appointment. In an *ad hoc* arbitration the process usually relies upon the courts for that assistance. However, it is not only a party that may fail to act, it is of course possible that the applicable institution or appointing authority fails to undertake the duties assigned to it, and in such a case it will be similarly necessary that the court steps in to ensure proceedings can go on.

The *lex arbitri* of the seat of the arbitration will set out the steps the party wanting to pursue the arbitration must take. Article 11(3) and (4) of the UNCITRAL Model Law provides a useful example:[55]

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[53] Fellas, 'Anti-Suit Injunctions' (2006), 26.

[54] Siemens AG and BKMI Industrienlagen GmbH v. Dutco Construction Co., Cour de Cassation, (January 7,1992).

[55] *See*, as a sample, including non UNCITRAL Model Law examples: Afghanistan Commercial Arbitration Law (2007), Article 19; Austrian Arbitration Act (2013), Section 587; Bangladeshi Arbitration Act (2001), Section 12; Barbados International Commercial Arbitration Act (2007), Section 14; Belgium Judicial Code (2013), Section 1685; Belize Arbitration Act (2000), Section 6; Civil Procedure Code of the Federation of Bosnia and Herzegovina (2003), Article 440; Brazilian Arbitration Law (1996), Article 13; Cambodian Commercial Arbitration Law, Article 19; English Arbitration Act (1996), Section 18; French Code of Civil Procedure (2011) , Article 1452; German Code of Civil Procedure (1998), Section 1035; OHADA States Uniform Act on Arbitration, Article 5; Serbian Arbitration Act (2006), Article 17; Slovakian Arbitration Act (2002), Section 8; The Netherlands Arbitration Act (1986), Article 1027; Trinidad and Tobago Arbitration Act (1939), Section 13; Turkish International Arbitration Law (2001), Article 7; Tuvalu Arbitration Act (2008), Section 10; Vietnamese Ordinance on Commercial Arbitration (2003), Article 26; Yemeni Arbitration Act (1992), Article 22.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure [(i.e. appoint an arbitrator)], unless the agreement on the appointment procedure provides other means for securing the appointment.

Sub-article 5 goes on to note that there is no possibility of appeal from a decision taken by the court in this circumstance, but it also sets out obligatory guidance regarding the approach that the court must take when making the appointment.

The Model Law experience of a number of jurisdictions as revealed in the UNCITRAL CLOUT Digest,[56] and the CLOUT database more generally, demonstrates that there are a variety of subsidiary issues that arise when a court is called upon to make an appointment or take measures pursuant to Article 11.[57] One immediate observation is that the powers of a court acting pursuant to Article 11(4) are wider than those given in Article 11(3). Under Article 11(3) the Court is only appointing the arbitrator, whereas under Article 11(4) the Court can undertake the 'necessary measure' – a term which is not defined. The difference is logical given the potential tasks that a court may need to perform particularly pursuant to Article 11(4)(c). That being the case, there is authority that a court could not compel an arbitral

[56] UNCITRAL 2012 Digest of Case Law on the Model Law ('UNCITRAL 2012 Digest'), available at www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (last accessed 26 December 2019).

[57] *See* the UNCITRAL 2012 Digest, 60-63 generally, noting issues such as the admissibility of an objection to the arbitral jurisdiction, challenging the existence of a deadlock, as well as the application of time limits.

institution to make an appointment, rather the court would take over that responsibility and make the appointment itself.[58]

An issue associated with courts supporting arbitrations by appointing arbitrators, which has over the years gained some considerable notoriety, has concerned the background of the individuals appointed though this process. In particular, in some jurisdictions, notably India in the past, there was a very evident habit of courts appointing former judges in the role.[59] Whether or not appointing former judges is to be considered as supportive or not of arbitration is a question that cannot be answered in the abstract.

## Supporting an arbitration during the course of proceedings

Once the arbitral proceedings have commenced, Courts can and often do play a vital role in sustaining that proceedings. The corollary of the private and consensual nature of arbitration is a system that often lacks the tools and infrastructure to enforce its own rules. There is a very good and strong system in place for enforcing arbitral awards, but this is by its very nature restricted to awards, and not every decision or action taken by a tribunal is an award. As such the arbitral process often looks to the court system for assistance and support.

During the arbitral process, it might be necessary, either for the arbitration tribunal or the national court, to render an order aiming to preserve evidence, protect assets or maintain the *status quo* while the outcome of the arbitration process is pending. Arbitration rules and laws have referred to these types of measures in one of the three following ways: conservative, interim or provisional measures.[60] While most national arbitration laws and arbitration rules in general grant an arbitration tribunal the power to issue interim measures, there might be circumstances in which the tribunal might nevertheless seek the support of national courts. These circumstances are where:

(1) The arbitral tribunal may not have the enough or necessary powers to grant interim measures;
(2) The arbitration tribunal needs to be formally constituted;
(3) The impact of the interim measure to third parties;
(4) The order to requesting a preliminary measure is not final; or

[58] *See Montpelier Reinsurance Ltd.* v. *Manufacturers Property & Casualty Limited*, Supreme Court of Bermuda, Bermuda, 24 April 2008, [2008] Bda LR 24, as cited in the UNCITRAL 2012 Digest, 63.
[59] *See, e.g.,* B. Srinivasan, 'Appointment of Arbitrators by the Designate Under the Arbitration and Conciliation Act: A Critique', *Economic and Political Weekly*, 49(18) (2014), 59, arguing that 'the judiciary has virtually created a monopoly by institutionalising appointment of retired judges as arbitrators.'
[60] For example, Model Law Article 17 and UNCITRAL Rules Article 16 refer to measures during the arbitration process as 'interim measures', while the ICC Rules, Article 28 refers to them as 'conservatory and interim' measures.

(5) There are limitations to *ex parte* applications on interim measures.[61]

## Competence of national courts to grant interim relief

First, it is of utmost importance to identify the power and competence of a national court to assist the arbitration process when granting interim measures. Therefore, when applying for interim relief it is important to identify the differences between applying for the relief to the arbitration tribunal or applying directly to a national court.

Commentators have identified that one of the most immediate consequences of directly applying for interim relief to national courts is that the application itself might operate as a waiver of the arbitration agreement.[62] In response to this concern arbitration rules often explicitly state that a direct application to a national court 'is not incompatible with the arbitration agreement.'[63] Whilst the use of a double negative phraseology could give rise to confusion, in this specific case it is now generally understood very clearly.

Although national laws have also recognised the compatibility between the arbitration agreement and direct application of interim relief to judicial authorities, there is a permanent tension that derives from parties requesting such relief from the national courts.[64] As pointed out in *Channel Tunnel Ltd* v. *Balfour Beatty Construction Ltd*,[65] once parties have requested interim relief from a court it might make an assessment and evaluation of the request as well as the legitimacy of the value to be protected. The tension that arises is that, although the court must give a preliminary assessment, it must also endeavour to respect the arbitral tribunal's competence to decide on the dispute. From the English Court's perspective, the best approach is that respect and consideration for the arbitration tribunal's powers to decide on the dispute should prevail over any desire of the court to make an assessment of the dispute as a whole.[66]

Consequently, the question that arises is: to whom should the parties apply for interim relief? Should the parties apply for interim relief to the arbitral tribunal or instead to the relevant national court? Having discussed the potential tension that might arise between the national courts and the arbitration tribunals, as regards procedural coordination, some laws have made clear that interim relief applications should be brought before the national courts. For example, the Swiss Private International Law Act Article 183(1) provides the statutory basis for an arbitral tribunal's jurisdiction to issue provisional and protective measures, provided

[61] Redfern *et al.*, *Redfern and Hunter* (2015), 421-4.
[62] Redfern *et al.*, *Redfern and Hunter* (2015), 424.
[63] *See, e.g.,* UNCITRAL Arbitration Rules, Rule 26(9): '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.' *See* also LCIA Rules, Article 9B, para. 9.12 and ICC Rules, Article 29(7).
[64] *See, e.g.,* UNCITRAL Model Law, Article 9.
[65] *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] AC 334.
[66] *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] AC 334, para. 367-8.

that the parties have not agreed otherwise.[67] It is important to note that while arbitration laws give the authority to the arbitral tribunal to issue provisional measures; the power to enforce these orders still remains with state courts and therefore arbitral tribunals need to seek the assistance of national courts.[68]

Other arbitration laws have carefully chosen to mandate the time at which parties can apply for interim measures before the courts and arbitral tribunals. For example, Section 44(3)-(5) of the English Arbitration Act 1996 provides that the requesting party can apply directly to the arbitral tribunal. Conversely, if the case is not urgent, the court shall act on the application of an interim relief which either was made with the permission of the tribunal or with the party's agreement. Most importantly, Section 44(5) provides that national courts shall act only if or to the extent that the arbitral tribunal has no power or is unable to act effectively.

### Type of measures

A relevant factor to consider when seeking the support of national courts in granting interim relief to an arbitral tribunal is the identification of the type of measure that needs to be sought. The type of measure can influence the parties' choice on requesting the relief either from a national court or an arbitration tribunal. The characterisation of interim relief might vary according to the legal tradition of a specific jurisdiction or national legislation. International arbitral practice and treatises have commonly agreed that interim relief can be divided into the following categories:

- Taking evidence from witnesses
- Measures related to documentary disclosure
- Preservation of the *status quo* of property or evidence
- Granting injunctions to reserve assets or prevent its disappearance
- Relief in respect of parallel proceedings

## Evidence / Subpoenas on both parties and third persons

A significant area where courts provide support to arbitral tribunals is in the issuing of subpoenas or other measures relating to evidence.[69]

Arbitral tribunals do not usually have the power to compel witness' attendance to arbitration proceedings and therefore the court's support for the arbitral process is necessary, particularly when the witness cannot be persuaded to attend voluntarily. In order to compel the attendance of a relevant witness an arbitration tribunal might request the assistance of a

[67] C. Boog in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer, 2013), Art. 183 Swiss Private International Law Act, 118-26; G. von Segesser and A. George, 'Swiss Private International Law Act', in L. A. Mistelis (ed.), *Concise International Arbitration*, 2nd ed. (Kluwer, 2015), 1189.

[68] *See, e.g.,* Swiss Private International Law Act, Article 183(2): '[I]f the party concerned does not voluntary comply with these measures, the arbitral tribunal may request the assistance of the state court; the court shall apply its own law.'

[69] Interim relief intended to preserve evidence is addressed *infra*.

national court, as spelled out in Article 27 of the UNCITRAL Model Law.[70] The English Arbitration Act 1996 gives an additional layer of guidance to the way national courts can assist arbitral tribunals in securing the attendance of a witness to give evidence. For example, Section 43 allows arbitration tribunals to use the same proceedings available to the court to secure the attendance of a witness. Another useful example of support given by national courts to the arbitration process is the US Federal Arbitration Act which grants to the arbitral tribunal the power to subpoena a witness, as long as they are present in the jurisdiction.[71]

A further notable example highlighting the importance of a national court's role in supporting the arbitral process is illustrated in CLOUT Case no. 391, Superior Court of Justice, Canada, 22 September 1999. In this case, it was concluded that an arbitral tribunal has no obligation to compel a witness to give testimony and in such cases a party should request the support of a national court. The court noted that an arbitral tribunal is not obliged to automatically grant assistance to the requesting party, particularly when there are no valid reasons to justify this request. In addition, the court concluded that parties are responsible for requesting the assistance of the national court and failure to do so cannot be attributed to the arbitral tribunal.[72]

In considering the support a court *may* be able to provide, there are two significant variables. The first concerns against whom the subpoena is sought – are they a party to the proceedings or a third person? The second concerns where the arbitration is seated – is the court being asked to assist a foreign seated arbitration? Perhaps unsurprisingly, different combinations of these variable lead to different results, and differing results in different jurisdictions.

### Measures related to documentary disclosure

Document disclosure is generally much less onerous in international arbitration than in national court litigation. However, the power of an arbitral tribunal to request document disclosure has a coercive effect only on parties to the arbitral process. This can become problematic if there are documents in the possession of third parties. In addition, there might be other limitations that might apply to measures related to document production; including time restrictions. For example, in CLOUT Case no. 77, High Court of Hong Kong, 15 August 1994, a court rejected the request of a party to assist in the production of relevant documents, on the grounds that this request was untimely. According to the court, the request exceeded the deadline before which a party could request interim measures from the national courts.

[70] UNCITRAL Model Law, Article 27: 'The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.'
[71] US Federal Arbitration Act, Section 7.
[72] S. L. Brekoulakis *et al.*, 'UNCITRAL Model Law', in Mistelis (ed.), *Concise International Arbitration* (2015), Article 27, 888-90.

While it is true that interim measures only have coercive power on parties to the arbitration agreement, some US courts have recognised that this limitation might not apply in all US jurisdictions and an application to obtain disclosure of documents in support of a foreign arbitration is possible.[73]

### Measures relating to evidence either locally or foreign seated

The least controversial and most easily facilitated scenario is where the subject of the subpoena or similar order is a party to the arbitral proceedings (or a signatory to the arbitration agreement), and the arbitration is seated within the territorial jurisdiction of the Court from whom the assistance is sought. The scenario might become more challenging when the relevant evidence is either outside the jurisdiction of the supporting national court or the evidence is in possession of a non-disputing party in the arbitration process.

First of all, it should be noted that seeking the support of a national court to obtain evidence should not produce adverse consequence; the tribunal's request is not a waiver of the arbitration agreement. This has been clarified in some arbitration rules, such as the ICC Rules Article 28(2), which provides that a party's request for conservative and interim measures before a state court should not be considered an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.[74]

Unless there is a relationship between the witness and one of the disputing parties (for example an employer-employee relationship), it can be difficult to persuade a witness to voluntarily testify in the arbitration. Arbitral tribunals do not possess a general power to compel witnesses, therefore a national court's assistance can be crucial to preserve or obtain certain evidence.

In this context, another question that needs to be discussed is the scope of evidence that national courts could request on the application of an arbitral tribunal or a party in an arbitration. More precisely, the crucial question that remains to be answered is whether collection of evidence includes support (1) to arbitral tribunals seated outside the territory and (2) the ability to request evidence from third parties. This will invariably depend on the national laws where the support is sought. Article 27 of the UNCITRAL Model Law mentions that an arbitral tribunal seeking support of the competent national court must do so in accordance with the court's own rules on the taking of evidence. In this respect, there are national laws which might provide more detail and guidance to the party aiming to secure the attendance of a witness before the tribunal as well as the production of documents.

[73] Section 1782 of Title 28 of the US Code permits a district court to order a person who 'resides or is found' in the district to give testimony or produce documents 'for use in a foreign or international tribunal […] upon the application of any interested person'; cf. Redfern *et al.*, *Redfern and Hunter* (2015), 430.

[74] *See* also UNCITRAL Rules, Article 26(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.'

The USA seems to extend the support of its courts to arbitral tribunals beyond its apparent jurisdictional competence. U.S.C. § 1782 is frequently referred as "the weapon of choice for international litigants seeking discovery".[75] U.S.C. § 1782 allows an "interested person" to apply for discovery over a person or entity "found" in the U.S. "for use" in a proceeding "in a foreign or international tribunal. There have been diverging interpretations U.S.C. § 1782 in cases determined at a level lower than the Supreme Court. This means that under US law, a district court can locate evidence if this is found in the district, this applies both to a witness giving testimony and the production of documents. This possibility is welcomed by commentators and arbitration practitioners as it not only applies to arbitral tribunals seated in the USA but also to arbitral tribunals seated elsewhere but seeking the support of US courts.[76]

In *Intel Corporation v Advance Micro Devices Inc. (AMD),* the US Supreme Court had the opportunity to entertain the question of whether to allow production of evidence for the use of a foreign tribunal. The Supreme Court recognised judicial authority to decide on a discovery request on the basis of a set of requirements. These requirements are spelled out in U.S.C. § 1782, including:

> *Who is the interested party requesting discovery?*
>
> *Is the forum a foreign or international tribunal?*
>
> *Is the discovery request reasonable, including the discoverability of the evidence?*

*Intel* sets the leading approach regard to the applicability of U.S.C. which seems to firmly clarify that this support to foreign courts extends only to *allowing* rather than *requiring* the discovery request to take place.[77] In the *Intel* case, the Supreme Court considered the nature of forum receiver of the requested evidence. In this instance it was the European Commission, which the Supreme Court characterised as a quasi-judicial body.

Questions remain however regarding the applicability of § 1782 in relation to proceedings before "private" international tribunals, i.e. arbitral tribunals. In the case *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, Inc., the US Second Circuit's held that an ICC commercial arbitration seated in Mexico was not within the scope of § 1782.[78] A different approach has been seen in New York.[79]

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[75] Lucas Bento, Section 1782 and International Arbitration: Is New York Still a Swing State?, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2016/12/19/section-1782-and-international-arbitration-is-new-york-still-a-swing-state/, accessed on 19 November 2019.

[76] C. Dupeyron and M. Valentini, 'Legal Instruments Used in the Search for Evidence in Support of Arbitration: A Comparative Study of Art. 145 of the French Code of Civil Procedure and S.28 U.S.C. § 1782 in the United States', *International Business Law Journal*, 6 (2013), 533-58.

[77] *Intel Coporation v Advanced Micro Devices*, 542 U.S. (2004),

[78] *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, Inc. 165 F.3d 184, 191 (2d Cir.1999)

[79] *In Re Ex Parte Application of Kleimar N.V.*, No. 16-MC-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016)

In *Re Ex Parte Application of Kleimar N.V.*, a New York court had to decide if an arbitral tribunal under the London Maritime Arbitration Association (LMAA) was a foreign tribunal. The Court noted that "the law is not entirely settled as to whether a foreign arbitral proceeding qualifies as a matter before 'a foreign tribunal' within the meaning of Section 1782.[80] Moreover, the Court qualified the LMAA tribunal as a "foreign" because it "*acts as a first-instance decision maker whose decisions are subject to judicial review*".[81] More recently, in another New York court , in the *Application of the Children's Investment Fund Foundation,* the Court considered an LCIA tribunal as a foreign tribunal, it noted that a tribunal includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts. [82]

While this is yet to be addressed by the Supreme Court, the *Kleimar* cases follow the same broad definition found in *Intel* by concluding that *quasi-judicial* should be also be considered as part of the scope of § 1782. As the situation currently stands it appears a fair assumption that pursuant to § 1782 US Courts can provide support to international arbitral proceedings.

Moving to the UK, Section 43(4) of the English Arbitration Act 1996 discusses the scope of support to the arbitral tribunal by highlighting that court procedures requesting the attendance of a witness or production of documents may only be used if the witness is in the United Kingdom and the arbitral proceedings are being conducted in England, Wales or Northern Ireland.[83] This means that while the seat of arbitration might be outside England, Wales or Northern Ireland, as long as the arbitral proceedings are *conducted* in that territory, national courts have the power to support the tribunal in obtaining evidence.[84] This support also covers evidence of third-party witnesses, including the production of documents (English Arbitration Act, Section 43 and 44).

Under Article 184(2) of the Swiss Private International Law Act either the arbitral tribunal or the parties before it (with consent of the tribunal) can request judicial assistance from the Swiss courts at the seat of arbitration. Any such assistance will be granted in accordance with Articles 167 and 163, respectively, of the Swiss Code of Civil Procedure, which also provides for measures against third parties (*i.e.*, fines) but not against parties to the arbitral proceedings. Swiss Law enables national courts to support arbitration beyond the jurisdictional limitations as there is the possibility to request assistance abroad under the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters.[85] Similar to the

[80] *Idem,* paras at 2-3

[81] *Application of Winning (HK) Shipping Co. Ltd.*, No. 09-22659-MC, 2010 WL 1796579,

[82] Application of the Children's Investment Fund Foundation (UK) ("Children's Fund"), Sir Christopher Hohn, and Axon Partners, LP ("Axon") for an Order to Take Discovery Pursuant to 28 U.S.C § 1782. See also Section 1782 Discovery for Use in Private Arbitrations: The New York Saga Continues, http://arbitrationblog.kluwerarbitration.com/2019/03/08/section-1782-discovery-for-use-in-private-arbitrations-the-new-york-saga-continues/, accessed on 21 November 2019.

[83] Redfern *et al.*, *Redfern and Hunter* (2015), 424.

[84] Joseph Tirado, Sherina Petit and Michelle Keen, *Chapter 23; Factual Evidence*, Julian D.M. Lew QC. Harris Bor, Greg Fullelove and Joanne Greenway (eds.), Arbitration in England, Kluwer International 2013, 494.

[85] von Segesser and George, 'Swiss Private International Law Act' (2015), Article 184, 1220.

UK and the USA, the Swiss Private International Law Act, Article 184, stipulates that local courts will also be able to assist the tribunal with the taking of evidence against third parties.[86]

## Other Interim relief (either granted by court or enforcing order of tribunal)

### Preservation of the status quo of property or evidence

During the arbitral process, it might be necessary to preserve relevant evidence and have a proper record of its original status. The best example could be a dispute related to perishable goods where an assessment of the quality has to be made. In this scenario, preservation of evidence is necessary by means of examination conducted by independent experts; this is a very good example of how disputing partings can seek relief as an emergency measure.[87] Section 44(3) of the English Arbitration Act 1996 lays out how national courts can support the arbitral process as regards the preservation of evidence. The English Arbitration Act 1996 grants national courts the power to support the arbitral process to the extent that the arbitration tribunal is not able to effectively grant the interim relief.[88] According to the Act, these powers include the preservation or inspection of evidence (including property) as well as the photographing of property and any other type of evidence.[89]

During the arbitral process, there might be scenarios where an award granting payment of damages to the successful party might not fully compensate the loss suffered. Therefore, during the arbitral process it might be necessary to seek interim measures which aim to preserve the *status quo* of a specific business situation (*i.e.*, to continue supplying a product while the dispute between seller and buyer is being resolved). Commentators have suggested that the applicable test for interim measures is not clearly enunciated in most national arbitration laws. However, Article 17A of the UNCITRAL Model Law refers to the following requirements that must be met by a party seeking interim measures: (1) 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 (2) that there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination regarding this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.[90]

### Granting injunctions to preserve assets or prevent its disappearance

National courts can support the arbitral process when the interim relief request would require the entry into premises in the possession or control of any of the disputing parties or a third

[86] Dupeyron and Valentini, 'Legal Instruments Used in the Search for Evidence in Support of Arbitration' (2013), 557.
[87] Redfern *et al.*, *Redfern and Hunter* (2015), 429.
[88] A. Sheppard, 'English Arbitration Act', in Mistelis (ed.) *Concise International Arbitration* (2015), Section 44, 1045-8.
[89] Redfern *et al.*, *Redfern and Hunter* (2015), 429.
[90] Sheppard, 'English Arbitration Act' (2015), Section 44, 1047.

party.[91] In addition, a national court has the power to authorise an expert or another party to conduct inspections on a property (*i.e.*, including buildings, lands, movable structures, etc.).

### Relief in respect of parallel proceedings

In international arbitration, there is one type of interim relief granted by national courts that is highly controversial as it is seen as not necessarily supportive of the arbitral process and often in tension with it, namely anti-suit injunctions. Anti-suit injunctions were discussed in detail earlier in this chapter. However, as a brief recap, an anti-suit injunction is an interim measure granted by national courts by which a national court will either prevent an arbitral tribunal from assuming jurisdiction or protect the jurisdiction of an arbitral tribunal. Anti-suit injunctions are often used in common law countries and can be used by the courts of the seat of arbitration or other national courts connected to the arbitration process (*i.e.*, where the arbitration award is going to be enforced).

## Further judicial assistance

### Confidentiality

The issue of confidentiality is one that varies from jurisdiction to jurisdiction.[92] Traditionally there was a divide between civil law and common law jurisdictions. Whereas the confidentiality of an arbitral proceedings was commonly a legal principle in civil jurisdictions, an inherent obligation of confidentiality was not recognised by common law jurisdictions.[93] As confidentiality (at least in international commercial arbitration) is generally seen as desirable, arbitral institutions have long included specific provisions in their rules; and over the last 10 to 15 years, clear and explicit confidentially obligations have been inserted in arbitration laws. Courts may be called upon to support the arbitral process by enforcing confidentiality obligations at any point during, and indeed even after it has concluded.

Australia is an example of a common law jurisdiction which introduced confidentiality obligations into its international arbitration legislation in 2010 and then further clarified them as recently as 2015.[94] The role of the courts within respect to these obligations is very clearly articulated.[95] The court's role is a supervisory one. A decision regarding whether confidential information can be disclosed is to be first taken by the arbitral tribunal.[96] A party unhappy

[91] Section 44, English Arbitration Act.
[92] X-ref to elsewhere in book.
[93] There are clear exceptions to this general proposition however, for example in the English Common Law recognises an implied term of confidentiality, whereas in the Swedish case of *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc, Case No T 1881-99* (Swedish Sup Ct 27 October 2000), it was found that there was not an implied duty of confidentiality. See citing these examples C. Partasides & S. Maynard 'Raising the Curtain on English Arbitration' *Arbitration International*, 33(2), (2017) 197–202.
[94] Australian Civil Law and Justice (Omnibus Amendments) Bill 2015, paras 19 & 214.
[95] Australian International Arbitration Act (1974) ss 23C – G. The New Zealand Arbitration Act (1996) contains similar provisions in s14.
[96] Section 23E, Australian International Arbitration Act (1974).

with the result of the tribunal's decision can have it reviewed by the court.[97] The decision of the court is final.[98] Where the mandate of the tribunal has concluded, a party seeking disclosure can proceed directly to the court for determination.[99]

### Catchall support

The general structure of this chapter has been to look at the issue of courts supporting the arbitration process through a combination of the stages of the arbitration process, and some specific issues that are likely to arise. However, the discussion has not been an exhaustive one, and the basis of court support need not always derive from a specifically articulated power found in the *lex arbitri* or an arbitration-related piece of legislation. It is important to recall that courts have an inherent jurisdiction and inherent powers. So a "pro arbitration" judge or court may be persuaded to rely on these powers to support an aspect of the arbitration process even where it may be novel, new or not otherwise contemplated in existing legislation.

## Conclusion

This chapter has described and discussed the role of domestic courts in international arbitration. More precisely, this chapter has studied the attitude of national courts regarding their assistance (or not) to an arbitration process. While the chapter has highlighted that the importance of courts to the arbitration process simply cannot be understated, it also noted that the relationship between arbitration and courts was a symbiotic one. This characterisation is not a new one[100] because the arbitral process does depend on the courts. Even where courts do not take decisions that are seen to directly favour the arbitral process, they are very likely nevertheless benefitting the arbitral process. Therefore, the main argument developed is that not only an arbitration process benefits from its relationship with state courts, but also that with their wide variety of special actions and general powers, domestic courts generally behave in a supportive manner. The relevance of this was very aptly stated by William Bassler, when he noted "judicial supervision in its current limited form gives international arbitration a validity and confers a legitimacy on the parties' agreement and the arbitrators' award, a legitimacy that they would not otherwise enjoy."[101]

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[97] Sections 23F & 23G, Australian International Arbitration Act (1974).
[98] Sections 23F(5) & 23G(4), Australian International Arbitration Act (1974).
[99] Section 23G(3)(a), Australian International Arbitration Act (1974).
[100] See for instance W G Bassler, 'The Symbiotic Relationship between International Arbitration and National Courts' (2013) 7 *Disp Resol Int'l* 101; E. Gloster, 'Symbiosis or Sadomasochism? The relationship between the courts and arbitration', *Arbitration International*, 34(3), (2018), 321–339.
[101] Bassler, (2013) 7 *Disp Resol Int'l* 118.