



**Are U.A.E. seated Arbitral Tribunals vested with adequate powers to grant Provisional Measures within the context of arbitration?**

هل هيئات التحكيم التي تتخذ من دولة الإمارات  
مكانا قانونيا لها مناصرة بصلاحيات كافية لإصدار تدابير تحفظية في سياق التحكيم؟

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## Abstract

*This research aims at finding the extent of the powers of UAE seated arbitrators in granting provisional relief within arbitration context before and during arbitration proceedings and have an overall examination of the current legal framework available for arbitral interim measures in UAE. in particular who is empowered to grant arbitral interim measures, be it before or after composition of the tribunal in an ad hoc, institutional or court ordered arbitration seated in UAE under DIAC & DIFC / LCIA as this latter regime provides a common law system in a civil law jurisdiction. I will be looking at foreign arbitration rules and laws in this research in which I will shed a light on the available arbitral interim measures conducted under DIFC / LCIA, under ICC, under AAA, under ICSID, under CIETAC, under LCIA Rules, under English Arbitration Act 1996, under Egyptian Arbitration Act No. 27 of 1994 and under Sudanese Arbitration Act of 2005.*

*Provisional measures aim at protection of status quo, preservation of evidences, and sale of perishable goods and secure subsequent enforcement of awards or judgments. Provisional measures act as holding orders pending final decision of the merits of the dispute by a judicial authority or a tribunal.*

*Most modern jurisdictions stipulate some preconditions for granting provisional measures which include inter alia, urgency, prime facie to establish jurisdiction, likelihood of success on the merits, imminent danger, provision of security and proportionality.*

*The importance of this study stems from the fact that the eventual outcome of an arbitral process will be potentially meaningless and ineffective if there is no well structured interim relief regime to secure the eventual enforcement of the award.*

*Moreover, if the disputants choose arbitration as a means of dispute resolution then an award once it becomes final, it will have res judicata effect and the arbitral tribunal becomes functus officio, so in case of lack of provisional measures, the award creditor will be left remediless.*

## ملخص البحث

يهدف هذا البحث إلى التوصل إلى مدى صلاحيات المحكمين الذين يتخذون من دولة الإمارات العربية المتحدة مكاناً قانونياً لهم من حيث إصدار التدابير الوقائية في سياق التحكيم قبل وخلال إجراءات التحكيم وإلقاء نظرة عامة على الإطار القانوني الحالي المتاح في دولة الإمارات العربية المتحدة ولا سيما الجهة المخولة بإصدار التدابير الوقائية التحكيمية سواء كان ذلك قبل أو بعد تشكيل هيئة التحكيم في التحكيم الخاص أو التحكيم المؤسسي والتحكيم الذي يتم عن طريق المحكمة في دولة الإمارات بموجب قواعد مركز دبي للتحكيم أو مركز دبي المالي العالمي / محكمة لندن للتحكيم الدولي، حيث أن هذه الأخيرة توفر نظام قانون عام في ظل نظام القانون المدني القاري المتبع هنا، وفي هذا البحث سوف ألقى نظرة عامة على قوانين وقواعد التحكيم وبصفة خاصة التدابير الوقائية التي تتم بموجب قانون الوينسترال وقواعد اليونسترال، قواعد غرفة التجارة الدولية، المركز الدولي لتسوية منازعات الاستثمار- واشنطن، مركز الصين الدولي للتحكيم التجاري والإقتصادي، الجمعية الأمريكية للتحكيم، محكمة لندن للتحكيم التجاري الدولي، قانون التحكيم الإنجليزي لعام 1996م، قانون التحكيم المصري رقم 27 لعام 1994م وقانون التحكيم السوداني لعام 2005.

تهدف التدابير الوقائية إلى حماية الوضع الحالي، حفظ الأدلة، بيع البضائع القابلة للتلف وضمان تنفيذ قرارات التحكيم أو الأحكام القضائية ولذلك فإنها تكون بمثابة أوامر تثبيت على ذمة القرار النهائي في موضوع النزاع عن طريق جهة قضائية أو هيئة تحكيم. معظم التشريعات الحديثة تنص على شروط لمنح التدابير الوقائية والتي تشمل من ضمن أشياء أخرى الضرورة الملحة، البيئة المبدئية بشأن إنعقاد الاختصاص لهيئة التحكيم وإحتمال النجاح في جوهر وموضوع النزاع، الخطر الوشيك والتناسب مع تقديم ضمان..

إن أهمية هذه الدراسة تنبع من حقيقة أن النتيجة النهائية للعملية التحكيمية قد تكون غير ذات معنى وغير فعالة إذا لم يكن هنالك نظام تدابير وقائية مبني على هيكل متين لضمان التنفيذ النهائي لقرار التحكيم.

وأخيراً، إذا إختار أطراف النزاع التحكيم كوسيلة لفض المنازعات التي تشجر بينهم، عندئذ فإن قرار التحكيم بمجرد صيرورته نهائياً سوف يكتسب حجية الأمر المقضي به وينتهي دور هيئة التحكيم، وعليه في حالة عدم وجود تدابير احترازية وقائية فإن الطرف الذي ينجح في موضوع التحكيم سوف يترك بلا تدبير.

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# CHAPTER ONE

*This chapter provides an overview of this research, contains the introduction, methodology of the research, limitation of the study, objectives of the study, importance of the provisional measures and terminology used to refer to provisional measures within the context of international commercial arbitration.*

## INTRODUCTION

Everyday thousands of contracts are executed without any problem worldwide but when a problem arises, there would be a need for an easy effective dispute resolutions mechanism. Traditionally, a court handles the task of solving commercial dispute but this adversarial method eventuates in making yesterday's best friends tomorrow's arch enemies.

Therefore, there is a dire need for an inquisitorial Alternative Dispute Resolution (ADR) which includes negotiations, mediation and arbitration etc.

In today's world, Arbitration encompasses almost all aspects of life. There are Institutional Arbitration and Ad-hoc Arbitration which govern the relations between natural and corporate person wherein awards issued thereof can be enforced under New York Convention or other BIT or MITS. There is ICSID arbitration to solve disputes between States and citizens or individuals of other States. Finally, there is International Court of Arbitration to solve disputes between sovereigns with hundred of arbitration institutes across the globe.

With the mounting cross-border trade exchanges in the wake of G.A.T., which substantially increased the volume of international trade, arbitration is gaining momentum given the advantages of arbitration over litigation which includes inter alia neutrality of forum, flexibility, finality, party autonomy, speed and cost. It is worth mentioning that the world's largest economy – U.S.A. is neither a party to any multilateral nor bilateral Judicial Enforcement Treaty the only option available is arbitration<sup>1</sup>.

There are some drawbacks facing international commercial arbitration, such as lack of coercive powers for the arbitral tribunal and restriction or non availability of interim measures, difficulty in enforcement of overseas seated interim measures and the uphill task of enforcing an interim remedy against a

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<sup>1</sup> Department of State – USA Official Website  
<http://www.state.gov/documents/organization/117601.pdf> last accessed 18/1/2013.

third party as the arbitral tribunal derive its jurisdiction from the consent of the arbitrating parties and the role of National Courts towards arbitration. Absent structured legal framework for provisional measures, the rights of the arbitrating parties will be irremediably prejudiced, notably a final award will have *res judicata* effect and the tribunal having rendered the award will be *Functus officio*<sup>2</sup>.

Hence, the eventual outcome will be meaningless and ineffective if an award issued without chance of enforceability and the assets in connection with the case have been moved out of the jurisdiction leaving the award creditor remediless.

Whereas arbitration proceedings take longer time, for instance as per Advocate Omer Al Sheikh, an arbitration proceedings held under DIAC administration might last for nine months and sometimes take three years. The same case is applicable to ICC Arbitrations which takes six months to three years and all these justify adoption of a sound infrastructure of arbitral interim measures in UAE. The scope of this research covers provisional measures in UAE and looks at other jurisdiction and the power of arbitrators to grant provisional measures.

Classic reasons for provisional measures include preservation of status quo, sale of perishable goods, protection of evidence, and prevention of dissipation of assets to secure subsequent enforcement.

Nonetheless, different jurisdictions take different approach towards provisional measures. For instance UAE law is silent on the issue of provisional measures though UAE law in principle does not prevent arbitrating parties to agree to vest the arbitrator with the power of granting provisional relief. While, the Egyptian law stipulates that the parties may

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<sup>2</sup> Latin word from online Black's legal Dictionary (2<sup>nd</sup> Edition) <http://thelawdictionary.org/functus-officio/> last accessed on 21/1/2013.

agree to vest the tribunal with the power to grant provisional measures<sup>3</sup>. In the other extreme the Greek law<sup>4</sup> and Argentina Law “arbitrators cannot order compulsory measures or measures leading to enforcement they must request from the judge who will lend the support of his jurisdictional powers for the most swift and effective carrying out of the arbitral proceeding<sup>5</sup>”, prevent the arbitrators from granting provisional measures. The Italian Court of Civil Procedures stipulates that “the arbitrators may not grant attachment or other interim measure of protection<sup>6</sup>”. While Brazilian case law shows that once an arbitral tribunal is composed, the court should not interfere with the arbitration process<sup>7</sup>. We see that there is no harmonization of the parameters and governing granting of provisional measures worldwide.

In the first chapter of this of this essay I will provide definition of the interim arbitral relief and the terminology used to refer to arbitral interim measures and then I will give an overview of the current legal framework of interim measures under UAE law. Thereafter, I will elaborate on the conclusion of the interviews I have made with stakeholders in arbitration, then I will look at the coercive power available to UAE seated arbitral tribunals and then examine whether an arbitrator in UAE can order anti-suit injunction.

Thereafter, I will look at the objective arbitrability of provisional measures under UAE law and then have a look at the requirements for provisional measures under UAE law and examine whether or not New York convention can be used to enforce foreign seated interim measures in UAE and how do UAE courts deal with foreign seated arbitration measures and the position of stateless provisional measures in UAE and then look at the interim measures in the light of case law as per the principles of Dubai Court of Cassation and

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<sup>3</sup> Dr. Mohamed Mahir & Dr. Atif Mohamed, *Arbitration Practice an analytical study for jurisprudence and supreme constitutional court* (Cairo University Printing Press) 863.

<sup>4</sup> Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (13<sup>th</sup> Title International Arbitration Law Library, Kluwer Law International, 2005)

<sup>5</sup> Argentine Code of Civil Procedures, Article 753

<sup>6</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Article 818, Oxford University Press 2005) 315.

<sup>7</sup> Felipe Sperandio, CMS Cameron McKenna ‘Kluwer Arbitration Blog’ (Brazilian Arbitration Act No. 9, 10 October 2010) <http://kluwarbitrationblog.com/blog/2012/10/26/brazilian-court-clarifies-jurisdiction-for-interim-measures/> last accessed on 30-01-2013.

the Supreme Federal Court in Abu Dhabi. At the end of the chapter 1, I will be looking at the liability for granting provisional measures by arbitral tribunals under UAE law.

In the Second chapter, I will start with the sources of powers of arbitrators to grant provisional measures and the types of provisional measures within construction context and provisional measures and the seat of arbitration and look at the principle of concurrent jurisdiction which is enshrined in the UNCITRAL Model Law which is adopted by more than 50 countries and the laws applicable to provisional measures. Then look at the enforceability of provisional measures and then look at the Doctrine of compatibility and non waiver and then look at provisional measures and res-judicata and at the end of the Chapter 2, I will look at Ex Parte Provisional Measures under UAE law.

In the Third Chapter, I will navigate through provisional measures of leading arbitration acts and international arbitration institutions rules including the UNCITRAL Model Law, the UNCITRAL Model Rules, Provisional measures under arbitration rules of Dubai International Arbitration Center, DIAC, arbitration rules under DIFC / LCIA, provisional measures under the arbitration rules of ICC and the concept of emergency arbitrator, provisional measures under the rules of AAA and the concept of optional emergency arbitrator and then look at provisional measures under the arbitration rules of ICSID, provisional measures under the Egyptian Arbitration Act No. 27 of 1994 and then provisional measures under Sudanese Arbitration Act of 2005, Arbitration Rules under LCIA Arbitration Rules and under English Arbitration Act 1996.

In the Fourth chapter, I will present the conclusions I have reached to and then furnish some recommendations based on the conclusion through this research.

## **1.1 METHODOLOGY OF RESEARCH:**

In this research I adopted the qualitative method. Interviews are made under

a qualitative method. where I met several people engaged in the arbitration industry including judges, lawyers, arbitrators, legal advisors, contractors and subcontractors, wherein I made interviews with several stakeholders in the arbitration industry, and the opinions from surveys of the respondents in meetings and interviews. The interviewees answered my questions with different varying opinions, for instance judges or those who work in the judiciary tend to favor court ordered provisional measures.

The interviews are conducted with those arbitrators, arbitral tribunal and judges based in UAE, as I have taken UAE as a case study.

I have gone through the principles laid by Dubai Court of Cassation which mirror image the practice of provisional arbitral measures in the United Arab Emirates.

### 1.2 Objectives of the research:

This research aims to demonstrate that it is widely accepted in the international commercial arbitration practice to stipulate in Arbitration laws and Institutional rules in leading arbitration seats for concurrent jurisdiction to empower arbitral tribunal and court alike to grant an injunctive relief. It is to be noted that there is no uniform approach to provisional measures different jurisdictions take different approach, there are challenges facing provisional measures vis –avis third parties, enforceability of provisional measures and ex parte provisional measures. I will provide some recommendations in the light of the interviews, rules and laws covered under the study and the current practice under UAE law.

### 1.3 Importance of provisional measures:

Provisional measures are designed specifically to facilitate conduct of arbitration proceedings, secure subsequent enforcement of awards or judicial decision without delving into the merits of the dispute, preserve status quo, sale of perishable goods, preserve evidence and respect sanctity of contract regarding the arbitrating parties' choice of arbitration as a mechanism to solve their disputes.

#### **1.4 LIMITATION OF THE STUDY:**

This study is mainly concerned with the Current Legal Framework of arbitral provisional measures under UAE law but I will look at other jurisdictions in order to have a glimpse of the other side of the picture of provisional measures practice in leading arbitral institutions and other jurisdictions. This study is based on empirical approach by interviewing senior professionals engaged in the arbitration industry, although most of them are arbitration savvy but still having them sit down for an interview was a bit difficult if not an uphill task, but eventually I managed to extract some of their time and I highly commend their cooperation despite their busy schedules and indeed I wish to express my gratitude for some walk-in interviews and to all of them for their insights which was an invaluable input to this study.

There are immense materials on provisional measures but in this paper I will focus on the current legal framework for provisional measures under UAE law and then have a look at other jurisdictions to have a glimpse about what is going on in the world and in order to reach some conclusion in the light of those rules and laws of arbitration adopted by the world leading arbitration seats.

#### **1.5 Terminology**

Terminologically speaking the following words are used interchangeably to refer to interim measures or provisional measures within the context of International commercial arbitration "provisional measures are known as provisional and protective measures, interim measures, interim measures of protection, interim or conservatory measures, preliminary measures, preliminary injunctive measures, urgent measures, precautionary measures, and holding measures. These terms are often used interchangeably. The references to the terms "provisional", "interim", "interlocutory", "preliminary", and "urgent" measures are, on one hand, references to the nature of these

measures. On the other hand, the references to the terms "protective" and "conservatory" measures are references to the purpose of these measures. This purpose is, for international commercial arbitration, preservation of the arbitrating parties' rights<sup>8</sup>.

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<sup>8</sup> Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (13<sup>th</sup> Title International Arbitration Law Library, Kluwer Law International, 2005).

## **CHAPTER TWO**

*The Second Chapter of this research includes the definitions of provisional measures, the current legal framework of interim measures under UAE law, interviews conducted in line with the grounded theory and the interviews, also I discussed the coercive powers available to UAE seated arbitral tribunal and I look at other jurisdictions, the arbitrability of provisional measures under UAE law and the rules and principles laid by Dubai Court of Cassation, requirements for provisional measures under UAE law, the extent of enforceability of New York Convention to enforce foreign seated interim measures in UAE, How do UAE courts deal with foreign seated arbitral measures, the position of stateless provisional measures in case of floating arbitration, arbitral interim measures in the light of case law as per Dubai Court of Cassation rules and Supreme court in Abu Dhabi and finally I will look at the liability of a granting provisional measures under UAE law.*

## **2.1 Sources of Arbitrator's Powers**

Essentially there should be a dispute then the sources from which the arbitrators derive their powers include the party's agreement to arbitrate the lex arbitri wherein some laws empower to grant provisional measures or provide for default / fall back powers for such objective<sup>9</sup>.

## **2.2 Definition of Arbitral Measures:**

Provisional measures cover wide spectrums of orders, they are used as risk management mechanism and there are no universal definitions of provisional measures nonetheless provisional measures are defined by some scholars under:-

“A provisional measure is broadly speaking a remedy or a relief that is aimed at safeguarding the rights of parties to dispute pending its final resolution. The underlying principle in respect of provisional measures is that no party right should be damaged or affected due to the duration of adjudication. The objective of such measures is generally to facilitate the “effectiveness of judicial [or arbitral] protection” by providing interim relief, which complements the final relief<sup>10</sup>”.

## **2.3 Current Statutory Framework of interim measures under UAE law.**

The threshold question, are U.A.E. seated Arbitral Tribunals vested with adequate powers to grant an Arbitral Interim Relief?

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<sup>9</sup> Ali Yesilirmak, Provisional Measures in International Commercial Arbitration (13<sup>th</sup> Title International Arbitration Law Library, Kluwer Law International, 2005) 54

<sup>10</sup> Ali Yesilirmak, Provisional Measures in International Commercial Arbitration (13<sup>th</sup> Title International Arbitration Law Library, Kluwer Law International, 2005) 5.

The answer to this threshold question can be answered by looking at the UAE *lex arbitri*, which is set out in the Code of Civil Procedures, e.g. Article No 203 -218, admittedly, the UAE law is silent on the issue of granting of arbitral tribunal the power to grant arbitral provisional measures but still the UAE Code of Civil Procedures contains some Articles and measures in connection with provisional attachments which are used for litigations and arbitration purposes alike. Though there is no binding case law or precedent so each case is decided on case by case basis and the courts deal with each interlocutory application independently despite the fact the Dubai Court of cassation lays down binding principles which the lower courts should follow and comply with unless otherwise overruled by another principle from the Dubai court of cassation.

Jurists and judges always hold that the contract makes the law “*pacta sunt servanda*” In this regard as per the practice of Dubai Court cassation and in line with the principle of party autonomy, the arbitrating parties can empower an arbitral tribunal to grant provisional powers and these rules are laid down by the Court of Cassation – Dubai.

The concept of party autonomy is enshrined in most arbitration laws and rules, the arbitrating parties may incorporate whatever rules or laws subject to any mandatory rules at the seat of arbitration. In this regard the Dubai Court of Cassation in challenge No. 204 of 2005 Commercial challenge held that: UAE Court has jurisdiction to order provisional measures and conservatory measures which are enforced in UAE even if the court has no competence to consider the merits of the original case, the scope of arbitration and attachment proceedings both of them are territorial jurisdiction<sup>11</sup>.

The Dubai Court of cassation held that attachment proceedings are non arbitrable as well as enforcement nor the cases in connection with validity of the same, but the Court held that there is an exception to this rule, the

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<sup>11</sup> Dr. Mohamed Mahir & Dr. Atif Mohamed, *Arbitration Practice an analytical study for jurisprudence and supreme constitutional court* (Cairo University Printing Press).

parties may agree to empower the arbitral tribunal to order provisional measures.

The Court of cassation held that there are certain cases which should be filed only before the competent court to the exclusion of arbitral tribunal *unless otherwise agreed*. This shows that the arbitrating parties may contract out of the jurisdiction of the court and empower the tribunal to select the law which should be applied. Absent such empowerment the UAE applicable law will prevail. This stands witness that UAE arbitral jurisprudence respects the doctrine of party autonomy subject to any mandatory rules applicable in the given case.

In another law case Challenge No. 204 hearing dated 2/7/2005, Dubai Court of Cassation held that “In the event that the substantive dispute in the case has been agreed upon to be referred to arbitration and the charter party agreement made no mention of an agreement on authority empowered to grant provisional measures and the consequent cases regarding validity of the same<sup>12</sup>.”

The Court of cassation Dubai elaborates that application for imposing provisional attachment on the funds of the respondents in Dubai and request for the validity and confirmation of the provisional attachment fall within the jurisdiction of Dubai courts.

### **How, when and to whom to apply, process, challenge and implement interim measures under UAE law.**

The present Current Legal Framework is available to the arbitrating parties under UAE Law.

The UAE *lex arbitri* as set out in the Code of Civil Procedures is silent on the issue of arbitral provisional measures notwithstanding the arbitrating parties,

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<sup>12</sup> Dr. Mohamed Mahir & Dr. Atif Mohamed, *Arbitration Practice an analytical study for jurisprudence and supreme constitutional court* (Cairo University Printing Press) 863.

for ex. the aggrieved party can apply directly *ex parte* to the summary judge at the court of first instance (a judge would not *ex officio invoke provisional measures*) for invoking of an injunctive relief pending decision of the substantive demands by the tribunal.

However such measure might be granted or denied depending upon the criteria set out in Article No. 235<sup>13</sup> Nonetheless an injunctive relief granted or denied by the summary judge can be challenged within thirty days or ten days depending upon urgency of the case as per the discretion of the judge before the competent court of Appeal, further the aggrieved party, whether being a claimant or a respondent can file a case before the court of cassation challenging the ruling of the lower court, however such proceedings would continue in parallel to the arbitral proceedings.

In this regard, the Dubai Court of First instance in Case No. 6<sup>14</sup> imposed a provisional attachment on a performance bond of Dhs. 35m, the case can be summed up that an electro-mechanical subcontractor submitted an interlocutory application to the summary judge at Dubai Court of First Instance, inter alia, demanding granting of an injunctive relief restraining the Defendant, who is the main contractor from calling the performance bond, the plaintiff contending that the Defendant is a limited liability company and the value of the performance bond is many folds the capital of the Defendant and that there is imminent risk and irremediable damages which cannot be compensated by any subsequent compensation and that the defendant might dissipate the assets of the limited liability company and the shareholders are only liable for their shareholding which would not exceed AED 300,000 and that the substantive merits of the case will be heard by the arbitral tribunal which typically takes a few months to be composed. Upon the review of the claims and counter – claims of both parties the Court of first instance restrained the defendant from calling the performance bond.

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<sup>13</sup> UAE Code of Civil Procedures, 1992.

<sup>14</sup> ETA v Al Habtoor [2012] Dubai Court of First Instance 6, [2012].

The defendant who is not satisfied with the ruling of Dubai Court of First Instance appealed to the Dubai Court of Appeal and the case is still going till the time of submitting of this paper.

The above-mentioned case shows how important for UAE law to provide for concurrent jurisdiction for courts and arbitrators alike and the importance of emergency arbitrator to cater for urgent applications before composition of the tribunal.

## **2.4 Procedures for applying provisional measures before Dubai Courts.**

### **THE FIRST STEP**

The moving party has to apply to the Department of summary application at court of first instance.

The aggrieved party can apply to the summary judge at the Department of Urgent Matters at Dubai court of first instance, normally the application for provisional measures is considered within one working day or so then the moving party should file a case to confirm the provisional measures pending arbitration proceedings. A case should be filed within 8 working days to confirm the validity of attachment else the case will be dropped as per Article No. 280<sup>15</sup> which stipulates that “the Garnisher within eight days at the latest from the date of imposition of the garnishment - should file to the competent court a case to confirm the right and validity of the garnishment in cases where garnishment is ordered by summary judge otherwise the garnishment will be considered as nonexistent”. It is to be noted that such measures are available for court litigation or arbitration and in the latter case the provisional measures application will continue in parallel to the arbitration proceedings and the court would accept an application for provisional measures ex parte in other words in the absence of other disputant. It is to be noted that there is

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<sup>15</sup> UAE Code of Civil Procedures, 1992 as amended in 2005.

no timeframe to complain against the decision of the summary judge accepting or denying the application for a provisional measure under UAE law.

### **THE SECOND STEP**

The competent court would pass its decision sustaining or denying the application for a provisional measure, then the remedy available to both disputants, either to respect the court decision or complain to the same judge or court which has issued the decision related to the provisional measure then the decision of the judge can be appealed at the competent court of appeal. However the timeframe for the appeal is 10 days or 30 days from receipt of the appeal decision by the party against whom the appeal is issued as per UAE law. Nonetheless the period of appeal ranges from 10 to 30 days and this rests with the Court to determine the urgency, in the cases of utmost urgency appeal is available only within 8 days as per discretion of the Court.

### **THE THIRD STEP**

The third avenue available is to file challenge at the court of cassation in Dubai or to the Supreme Federal Court in case of pursuing a case at Federal courts in UAE. The timeframe for lodging a challenge against the decision of the court of Appeal Dubai is 60 days from the date of the receipt of the decision of the Court of appeal by the Appellee. These procedures are applicable to provisional measures in connection with ad hoc, institutional or court ordered arbitration.

## **2.5 Interviews**

In order to have real world and first hand experiences, I conducted interviews with senior professionals engaged in the arbitration industry as well as the judiciary, legal advisors and lawyers as under.

I will start with the hierarchy of the interviewees, I will start with Dr. Ibrahim Ali Alimam, Chairman of Dubai Court of Cassation, being the highest court in the country, I put forward to him several questions as follows;

I started the interview with my question, kindly shed a light on the objective arbitrability of provisional measures, in other words. Is it permitted as per the practice of the Dubai court of cassation to order interim measures within the context of real estate arbitration in Dubai? He stated that all subject matters of disputes are arbitrable except those provided for under UAE by virtue of mandatory rules. He went on to say that there is a case wherein the arbitrator based his award on the failure of the developer to register an off-plan transaction with the competent authorities, in this regard, the Department of Land and Property and as per the law regulating the Interim Real Estate Register in the Emirate of Dubai<sup>16</sup>.

- i. "The Interim Real Estate Register is used to record all disposals of Real Estate Units off plan. Any sale or other disposition that transfers or restricts title or any ancillary rights shall be void if not recorded on that Register.
- ii. Any developer who made a sale or other disposition that transferred or restricted title prior to the coming into force of this Law should approach the Department to get it registered in the Real Estate Register or the Interim Real Estate Register, as applicable, within 60 days after the date on which this Law came into force."

He clarified that Article 13 is mandatory rule may not be contracted out by the disputants and that any agreement to the contrary is null and void, given the fact this Article falls within the definition of public policy. In the meantime arbitrating parties are at large to refer to arbitration all issues related to real estate including delay, completion, LDS, compensation but Registration falls within the definition of public policy.

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<sup>16</sup> Dubai Interim Real Estate Register, Article No. 3 of Law No. 13 [2008].

During the interview, he clarified that since registration disputes are non-arbitral essentially provisional measures in connection with real estate registration are non-arbitrable and should be sought from the competent court?

Further I asked Dr. Imam, Chairman of Dubai court of cassation about the enforceability of an offshore seated arbitral order, he explained that when faced with such an application for enforcement of foreign seated arbitral or court order, the court typically looks at the local applicable laws, international or Regional MITS and Bilateral agreement, if there are no provisions thereof then the court does apply the principle of reciprocity to the particular case in question.

He explained that in the broad sense of the word the concept of public policy is elastic and loose in terms of international arbitral, legal or judicial jurisprudence and the concept of order policy or public policy differs from one jurisdiction to another, he recalled the expression of an English judge who resembles the concept of public policy to an unruly horse.

The earthquake of setting aside of the award of that real estate dispute sent aftershocks all over arbitration circles and end users in UAE and the region, I hope that the picture is now clear that objective non-arbitrability encompasses real estate registration which falls within the definition of public policy and that other disputes, e.g. delay, completion, LDS and the like are quite arbitral. In this regard, I propose that UAE legal system should introduce the concept of declaratory relief to know beforehand the statutory position for future legal action and avoid inbuilt risks associated with judicial and arbitral proceedings which entail loss of time and money.

Looking at other jurisdictions for instance, the Russian law stipulates that real estate cases are non-arbitrable essentially provisional measures are non-

arbitrable. “Article 248 Exclusive Competence of Commercial Courts in the Russian Federation in Cases with the Participation of Foreign Persons<sup>17</sup>.”

- “Cases concerning state property of the Russian Federation including disputes concerning the privatization of state property and eminent domain;
- Cases, the subject matter in which is immovable property or the rights to it, if this property is located on the territory of the Russian Federation;”

I had an interview with Dr. Taj Alsir, Head of Judicial Inspection at H.H. Ruler’ court of Dubai. The meeting was so fruitful as Dr. Taj was my professor at the undergraduate level, the meeting included Dr. Abbas Ahmed and Dr. Ibtisam of Judicial Inspection at H.H. the Ruler’s court, there was broad discussions about provisional measures and the interviewees unanimously agreed that a tribunal may be vested with powers of granting interim relief but they underlined that arbitral jurisprudence, scholarly opinions and academics alike are admitting that for practical and logistical reasons arbitral tribunal typically lack the sanctioning coercive powers “Emporium” to enforce their orders, therefore the enforcement should be left to the jurisdiction of municipal court.

I had another meeting with Advocate Omar Al-Sheikh, a construction front end attorney of Hadeef and Partners, Dubai, when asked about his opinion whether or not to empower arbitral tribunal with granting provisional measures. He stated that he believes that arbitration should be only in highly technical matters as some arbitrators having some engineering and technical backgrounds but conversely they lack the “legal sense“ therefore should be more trained, he went on to say that granting an injunctive relief during or before arbitral proceedings is a very serious issue and has far reaching consequences to the respondents, in particular measures like attachment, but still under UAE court practice, courts do invariably grant orders for arrest

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<sup>17</sup> Russian Commercial Courts Procedure, Article 248.

of vessel upon furnishing of prime facie evidence of the outstanding liability as there is in-built risk in allowing foreign flag vessel sails out of UAE territorial waters and this might have serious repercussions and the moving party will be left remediless. However he reiterated that each case should be judged on its merits and the enforcement should be left to the state courts only.

I had another interview with Arbitrator and legal Advisor Majid Bin Bashir, an ex- senior Executive at Dubai Chamber of Commerce & Industry, he stated that Arbitral Institutions and Arbitral Tribunal in practice depend upon the UAE courts to grant and enforce arbitral orders during or before arbitral proceedings and he hoped that the upcoming new UAE Arbitration Act will handle and solve this issue in line with international arbitral practice.

I had a meeting with Mr. Subhani, a senior staff at a leading construction company, he believes that given the complex nature of construction disputes arbitrators should be empowered to grant provisional measure within the context of arbitration.

I had another meeting with the management and staff of Al-Bawardi Advocates & Legal Consultants, Dubai, Advocate Abdul Rahman stated that as per my own opinion given my legal practice in Dubai, the arbitrators should be vested with the power of granting provisional measures within the context of arbitration on the understanding that they do thoroughly study the case files which include contract and addendums thereof as arbitration case entails huge contracts in terms of documentation which require more time to study, therefore empowering arbitrators to grant provisional remedy would save time notably the very same tribunal will finally decide the substantive merits of the case ,this approach will not be challenged by the claims of some jurist and scholars that empowering arbitral tribunal to grant provisional measures might lead to miscarriage of justice but this view point violates the sound perspective in arbitral jurisprudence as deciding provisional measures is complementary and does not touch the merits of the dispute and party who decides the final merits of an underlying dispute will be in a better position to

decide the provisional measures in the case, arguably provisional measures are integral part of the substantive dispute.

I had another meeting with Mr. Denis Brand, a senior construction front end attorney, Mr. Brand stands at the other extreme, he disagrees with Advocate Abdurrahman and he argued that the judiciary is in a better position to grant provisional measures unlike the arbitrators who lack the necessary training and experience to decide such pivotal issues. Mr. Brand went on to say – “Only Court is not an arbitral tribunal should grant an injunctive relief”.

He went on to say that depending upon the system of the country, “a Judge is either appointed straight from college and trained to become a Judge, first in the lower courts then as he/she becomes more experienced is promoted to higher level courts or following serving as a lawyer for many years is appointed as a Judge”.

In either case the Judge has a detailed knowledge of the law of the country where he/she is appointed of the remedies available and in what circumstances they should be used.

Any order of a court can be appealed if either party is dissatisfied with the order.

“It would be wrong to assume that all arbitrators are lawyers; often they are not and therefore, in my view it would be dangerous to give arbitrators greater powers and authority than they already have. My main concerns would be - do they understand the governing law of the contract? As an arbitral tribunal they can seek assistance from experts in relation to the dispute. Do they understand what remedies are available and are they competent to make orders in respect of such remedies? The saying that a little knowledge is dangerous comes to mind!

There is no guarantee that an arbitrator who is not a lawyer will make an appropriate interim order and if either party is dissatisfied with the order, as

there is no appeal, the dissatisfied party must make application to the Court for an order reversing the order of the arbitrator.

Therefore, by giving an arbitral tribunal greater powers and authority will not make the process more efficient as the courts will still likely become involved in relation to interlocutory applications”.

In another meeting, I interviewed a paralegal of a leading business house in Dubai, which has a sister company which entered into contract with a Construction Company, the parties are now engaged in a bitter dispute over multi party Construction, the underlying contract is subject to an arbitration proceedings but the subcontractor is praying for a provisional remedy, I asked the paralegal working over 35 years with the subcontractor whether he prefers to apply to a court or an arbitral tribunal for provisional measures, he pre-empted my question by saying the arbitrators straight away, this is understandable as the company where the paralegal works, the court of appeal dismissed the confirmation of their attachment in one construction dispute.

Based on the analysis of the interviews, I reached to the following conclusion:

Almost all judges tend to prefer to retain the final say in deciding the provisional measures to the judiciary.

While arbitrators feel that they are most suited to decide the provisional measures applications on the understanding that they know case files and will eventually decide the merits of the case. On the other end of equation, legal advisors are divided, some of them are of the opinion that the provisional measures within the context of arbitration should rest with arbitrators while others feel that there should be concurrent jurisdiction for both of them.

For other stakeholders in the arbitration industry, the contractors and subcontractors are of the opinion that the issue of provisional measures within the context of arbitration should rest with arbitrators.

Personally my opinion is that there should be concurrent jurisdiction to enable the judiciary which has inherent jurisdiction to grant provisional measures and empower arbitral tribunal as well as to grant an injunctive relief in this line with arbitral jurisprudence. Reasons for Concurrent jurisdiction are required before appointment of the tribunals. Arbitrators cannot injunction third parties<sup>18</sup>.

In this regard, we have to differentiate between three issues in connection with provisional measures, best arbitration practice and scholarly opinions.

- The power to grant provisional measures within context of arbitration which I believe should be concurrent jurisdiction.
- The power to enforce provisional measures should rest with national courts which have logistical capability to enforce an injunctive relief against all parties, wherein one should apply to court in case of provisional measures vis-a-vis third parties and ex parte provisional measures.
- While the sanctioning power, that the coercive power to compel enforcement “the imperium“ which national court only can do, this should rest with national courts.

We can observe that the above three points are subject to several schools of thoughts and there are huge arbitral literatures on these three points where we can find that there are arbitral jurisprudence and scholarly opinions regarding pros and cons for the above points and as who should grant provisional measures.

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<sup>18</sup> Ali Yesilirmak, Provisional Measures in International Commercial Arbitration (13<sup>th</sup> Title International Arbitration Law Library, Kluwer Law International, 2005) 69.

## 2.6 What are the coercive powers available to UAE seated arbitral tribunal?

Unlike section 7 of the Federal Arbitration Act (FAA) which empowers arbitrators to subpoena witness within jurisdiction either to disclose relevant evidence or to appear or to give evidence and such summons will be made in the name of the tribunal, failure to obey such summons amount to contempt of court and upon petition, a US competent court may compel appearance before tribunal or punish a person for contempt as if the same was disrespect, neglect refusal or neglect to appear before US court.<sup>19</sup> failure to comply with provisional measures issued by a tribunal amounts to contempt of court, some scholars are of the opinion that failure to comply with provisional measures of an arbitral tribunal can draw an adverse inference. The writer of this research is of the opinion that with due regard to the consensual nature of arbitration an adverse inference ought not be drawn in case of non compliance with provisional measures as there are some unforeseen circumstances beyond the control of the arbitrating parties notably in construction context such as an arbitral practice should not be construed in analogy with court proceedings, I quote the most scholarly comments which describe the coercive powers of the arbitrator “Ultimately, of course, the arbitrators' greatest source of coercive power lies in their position as arbiters of the merits of the dispute between the parties. Parties seeking to appear before arbitrators as good citizens who have been wronged by their adversary would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims<sup>20</sup>.”

Nonetheless UAE seated arbitral tribunals have no such coercive powers as provided for in the FAA.

### Can arbitrator order Anti suit injunction under UAE Law?

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<sup>19</sup> Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration (5<sup>th</sup> Edition, Oxford University Press 2009) 740.

<sup>20</sup> Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration (5<sup>th</sup> Edition, Oxford University Press 2009).

The present position under UAE law governed is by the Article “5. If the parties of a dispute agree to refer the dispute to arbitration, no suit may be filed before the courts. Notwithstanding the foregoing, if one of the parties files a suit, irrespective of the arbitration provision, and the other party does not object to such filing at the first hearing, the suit may be considered, and in such case, the arbitration provision shall be deemed cancelled<sup>21</sup>.”

In the light of the above-mentioned Article, a party cannot apply to an arbitrator requesting to issue an anti suit injunction given the fact there is arbitration clause rather the matter can be raised at the first hearing to object to the jurisdiction of the court to hear the case as arbitral tribunal or arbitral Institutions even if administering an arbitration cannot issue an anti suit injunction. In the case of existence of an arbitration clause, submission or terms of reference a court is not in a legal position to order anti-arbitration injunction on its own motion. In this regard the Court of cassation Dubai, in challenge No. 514 hearing dated. 1/6/1999<sup>22</sup> held that a defence based on arbitration show clause may not be raised before court of cassation, this arbitral case law, the court of cassation held that a new defence which was not raised earlier before the trial court, may not be raised for the first time before the cassation court, insistence to refer the matter to arbitration should be raised at the first hearing.

There are no defined specific laws for empowering arbitral tribunal with any powers to grant provisional measures including inter alia anti suit injunction. Therefore the matter rests with court, a party is entitled to object to the jurisdiction of the court on the first hearing of substantive case failing which the silence of the party would be construed as a waiver of the agreement to arbitrate and the court will go ahead with hearing of the case.

## **2.7 Arbitrability of Provisional measures under UAE law:-**

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<sup>21</sup> UAE Code of Civil Procedures, Article 5.

<sup>22</sup> Dr. Mohamed Mahir & Dr. Atif Mohamed, Arbitration Practice an analytical study for jurisprudence and supreme constitutional court (Cairo University Printing Press).

While UAE courts have inherent jurisdiction to grant and enforce provisional measures under an interlocutory application in aid of litigation or arbitration, the moving party should ascertain that the underlying dispute is arbitratable when applying to an arbitral tribunal for an injunctive relief in aid of arbitration proceedings.

Before requesting an arbitral relief from an arbitral tribunal, one should bear in mind that the underlying dispute should be arbitratable under law, as there are some matters which are non arbitratable which include commercial agencies and insurance policies if not mentioned in a separate contract and most recently real estate registration disputes which joined the list as per the following rulings of Dubai Court of cassation though a party can apply directly to the court for other types of provisional measures in connection with real estate like delay, liquidated damages, variations and completion.

Most arbitral rules in UAE provide for some sort of provisional measures theoretically a party can apply to any appropriate provisional measure, but in practice arbitrating parties and arbitrators alike should bear in mind that real estate cases registration are non arbitratable under UAE law, essentially provisional measures in connection with a real estate case registration should be sought from the competent court, in this regard the Dubai Court of Cassation passed a judgment on 16 September 2012, the court of cassation has vacated the award<sup>23</sup>, effectively setting the aside an injunction of enforcement of a local award which passed all stages of litigation, e.g. court of first instance and court of appeal but the court of cassation set aside the order of enforcement on grounds of public policy "though arbitral interim measures are viewed as a matter of procedure rather than of merits".

*"Are considered of Public Policy, rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and*

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<sup>23</sup> Baiti Real Estate Development v D.Z. Inc [2012] Dubai Court of Cassation, 14 [2012]

*foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic Shari'a<sup>24</sup>.*

## **2.8 Requirements for provisional measures under UAE laws:**

“Without prejudice to the provisions of any other law, the creditor may request that the court hearing the case or the judge or the summary proceedings as the case may be place the interlocutory garnishment against the properties and movables of the debtor in the following cases:

1. Every case in which he fears loss of the guarantee of his right, such as the following cases:
  - a. If the debtor has no permanent residence in the State.
  - b. If the creditor fears that the debtor will escape or will smuggle out or conceal his properties.
  - c. If the securities of the debt are under threat or loss<sup>25</sup>.”

From Article No. 252 of the Federal Law No 11 of 1992, we can observe that moving party has to apply to the competent court, typically the department of urgent Matters at the court of first instance in Dubai court or the summary judge but the applicant should bring into considerations the requirements in order to convince the court to accept the application.

- A. “In case of fear of loss of the guarantee of the right, this go to show that such Article can be relied upon to apply for an urgent order to secure an enforcement of an arbitration outcome.
- B. In case the debtor might conceal or smuggle the assets of UAE to other jurisdiction where an award cannot be enforced due to lack of BITS or MITS with UAE or in case the place where the award to be enforced no New York Convention territory. “

<sup>24</sup> UAE Civil Code, Federal Law No. 5 [1985], Article 3.

<sup>25</sup> UAE Civil Procedures Law, Federal Law No. 11 [1992], Article 252.

It is to be noted that transfer of financial assets can be made electronically which would prejudice an award creditor therefore a practical robust provisional measures regime would secure the rights of the arbitration parties, see the recommendation set herewith in Page No. 70 of this research

Looking at UNCITRAL Model Law & UNCITRAL Rules, the Chartered Institute of Arbitrators (CIARB) U.K. Proposes Practice Guideline & parameters for granting provisional orders as under;

- i. "Harm is likely to result that cannot be adequately reparable by a damages award if no order is made and that this outweighs the harm likely to result to the respondent if the order is granted; and
- ii. There is a reasonable possibility that the applicant will succeed on the merits of the relevant claim<sup>26</sup>."

Based on the abovementioned Clauses one can see that there are requirements which should be satisfied which include inter alia, fear of loss, if there is no permanent of debtor or the debtor might escape or smuggle the assets out of jurisdiction frustrating potential subsequent enforcement, nonetheless all these matters fall within the discretion of the competent judge.

## **2.9 Can New York convention on Recognition and Enforcement of Foreign Arbitral Awards be used to enforced foreign seated provisional measures in UAE?**

The UAE acceded to New York convention on 13 June 2006 under a Federal Decree No. 43 for the year 2006 as per Article No. (236) "Judgment or order had obtained the absolute degree in accordance with law of the issuing court<sup>27</sup>." Since New York convention on Recognition and Enforcement of Foreign Arbitral Awards deal with final and binding awards, there is doubt as to enforceability of provisional measures under the convention in UAE. It is

<sup>26</sup> Chartered Institute of Arbitrators (17 October 2011) < <http://www.ciarb.org/information-and-resources/Practice%20Guideline%20%20uncitral.pdf>> last accessed on 22/3/2013.

<sup>27</sup> UAE Code of Civil Procedures, 1992 amended in 2005.

prudent to look at other Conventions and treaties to which UAE is signatory in order to verify the best approach in seeking to enforce an arbitral order in UAE. Even looking at other jurisdictions there is no uniform approach of using the convention as a mechanism of enforcement of provisional measures.

The convention deals only final awards. So by their very nature provisional measures are temporary and reversible and can be endorsed or modified or canceled by the tribunal. Looking at comparative jurisdiction, different jurisdictions take different approach for instance some American Court held that New Convention can forbid court from granting provisional measures<sup>28</sup>. So far only six nations have agreed to sign an additional protocol on enforcement of provisional measures of New York Convention in order provide for recognition and enforcement of arbitral interim measures<sup>29</sup>.

The Netherland Arbitration Act 1986 allows the arbitrating parties to authorize the arbitral penal to issue provisional measures in summary proceedings and this is allowed enforcement of measure as if it were an award<sup>30</sup>.

### **2.10 How do UAE courts deal with foreign seated arbitral measures?**

The UAE courts when sized of an application to order provisional measures look at the arbitration agreement, the mandatory rules and BITS & MITS to which is a party and is generally governed by Article No 235 to 238 of The UAE Civil Procedure Code, Federal Law No. (11) Of 1992 Chapter (IV) under the heading "Execution of Foreign Judgments."

Nonetheless Article No. 235 is considered as a basis of enforcement of an offshore arbitral or court order in connection with arbitral proceedings but still the Principle of reciprocity is adopted as confirmed by Dubai Court of Cassation, further details see interview with Chairman of Dubai Court of

<sup>28</sup> [www.oxfordjournals.org/page/3866/11](http://www.oxfordjournals.org/page/3866/11) last accessed on 15-02-2013

<sup>29</sup> Insights from Prof Dr. Peter Lectures delivered on Oxford weekend. King's College London

<sup>30</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2005) Ch 9, 305.

Cassation on Page No. 19, Article 235 is based on a principle of mutual recognition, whereby the UAE Courts will only apply the provisions of that Article in relation to judgments and awards issued in countries which in turn recognize and enforce UAE judgments and awards. “Article (235) Judgments and orders passed in a foreign country may be ordered for execution and implementation within UAE under the same conditions provided for in the law of foreign state for the execution of judgments and orders passed in the state.

1. “Petition for execution order shall be filed before the Court of First Instance under which jurisdiction execution is sought under lawsuit filing standard procedures. Execution may not be ordered unless the following was verified:-
  - a. State courts have no jurisdiction over the dispute on which the judgment or the order was passed and that the issuing foreign courts have such jurisdiction in accordance with the International Judicial Jurisdiction Rules decided in its applicable law.
  - b. Judgment or order was passed by the competent court according to the law of the country in which it was passed.
  - c. Adversaries in the lawsuit on which the foreign judgment was passed were summoned and duly represented.
  - d. Judgment or order had obtained the absolute degree in accordance with law of the issuing court.
  - e. It does not conflict or contradict with a judgment or order previously passed by another court in the State and does not include any violation of moral code or public order<sup>31</sup>.”
- Provisions of the preceding Article shall apply to the arbitration decision passed in foreign countries. Arbitration decisions must be passed on a

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<sup>31</sup> UAE Code of Civil Procedures

matter which may be decided on by arbitration according to the law of the country and must be enforceable in the country it was passed in<sup>32</sup>.”

- Attested documents and conciliation reports authenticated by Courts in foreign countries may be ordered to be executed in the State under the same conditions provided for the execution of similar orders and reports passed in the UAE as stated in the law of the foreign country. Execution order referred to in the preceding para shall be requested vide a petition filed with the execution judge. Execution order may not be passed unless the conditions for the implementation of such document or report were verified to have been met in accordance with the laws of the country in which it was attested or authenticated and after verifying it to be free from anything in violation of moral code or public order<sup>33</sup>.
- Rules provided for in the preceding Articles do not prejudice rules and regulations provided for in conventions signed between the UAE and other countries in this respect<sup>34</sup>. “

## 2.11 Position of Stateless provisional measures

Do UAE Courts recognize stateless or floating arbitral interim measures?

In fact UAE courts do not recognize floating arbitration;

1. "Judgments and orders passed in a foreign country may be ordered for execution and implementation within UAE under the same conditions provided for in the law of foreign state for the execution of judgments and orders passed in the state<sup>35</sup>."

From the above-mentioned Article one can infer that an offshore order would be ordered for execution in UAE under same conditions stipulated for in foreign seated order such floating awards hit the ground when it comes to enforcement in UAE and as per Article No. 235/2 "Petition for execution order shall be filed before the Court of First Instance under which jurisdiction

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<sup>32</sup> UAE Code of Civil Procedures, Article 236

<sup>33</sup> UAE Code of Civil Procedures, Article No. 237.

<sup>34</sup> UAE Code of Civil Procedures, Article No. 238.

<sup>35</sup> UAE Code of Civil Procedures, Article No. 235.

execution is sought under lawsuit filing standard procedures. Execution may not be ordered unless the following was verified: that the order require<sup>36</sup>.

## **2.12 Arbitral interim measures in the light of case law as per Dubai Court of cassation rules and Supreme Court in Abu Dhabi.**

Arbitral case law in UAE;

The UAE as a civil law jurisdiction unlike common law jurisdiction has no precedents in court judgments in connection with litigation and arbitral matters referred to the competent court in any aspect nonetheless the Federal Supreme Court – Abu Dhabi and Court Cassation in Dubai, being the highest courts in the country issue legal rules which has persuasive nature albeit they have something of a binding nature in any subsequent proceedings unless otherwise overruled by another principle by the court of cassation or federal supreme court in Abu Dhabi .

The Supreme Federal Court - Abu Dhabi in Case No. 7 held that UAE courts have jurisdiction to consider granting of urgent orders and conservatory measure even if UAE courts have not jurisdiction in the original case, and that no agreement in the arbitration submission that the tribunal has no jurisdiction to grant provisional measures or conservatory measures and that the jurisdiction of the tribunal is limited to dispute related to construction or execution of the contract, and this does not authorize the tribunal to decide the same and this would restrain the disputants from applying to the court to decide the same and this would not amount to waiver of arbitration clause the scope of which is restricted to the sustentative aspect, for instance a dispute over liquidation of a contracting company<sup>37</sup>.

In other interesting case the Federal Supreme Court of Abu Dhabi the arbitrating parties agreement in the arbitration submission to implement the provisions of the Belgium law and the Rules of ICC (International Chamber of

<sup>36</sup> UAE Code of Civil Procedures, Article No. 235/2

<sup>37</sup> Challenge No 225 of 24 hearing dated 26/11/2002, Federal Supreme Court - Abu Dhabi

Commerce) would prevent reliance upon provisions of UAE Federal Code of Procedures No. 11 of 1992 upon ratification of the award challenge No. 379 hearing dated. 14/12/1997 Abu Dhabi Federal Supreme Court  
 Arbitral award will have res judicata effect once it is issued even if it is challenged by all avenues of challenge so long as it remains valid and is not set aside<sup>38</sup>.

### **2.13 Liability for granting provisional measures by arbitral tribunal under UAE.**

Insurance companies do invariably provide insurance coverage for provisional indemnity and professional malpractice; if not all provisional measures are granted by UAE courts therefore there is mostly no risk involved with granting arbitral measures by arbitrators in UAE as they are effectively have no power to grant such measures unless otherwise agreed by the parties.

### **Can an aggrieved party sue the moving party for unjustified provisional measures under UAE LAW?**

In event of damages for unjustified provisional measures the injured party may sue the moving party under Article No. 282 of the UAE Civil Code which stipulates that "Any harm done to another shall render the actor even though not a person of discretion liable to make good the harm<sup>39</sup>" however the court would not ex officio order damages, the injured party should apply to the competent court, such approach by UAE law might restrain unmeritorious vexatious applications for provisional measures but in practice so far there is no case filed against a moving party or an arbitrator for unjustified provisional measures as almost all provisional measure in UAE are court ordered.

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<sup>38</sup> Challenge No 317 hearing dated 29/11/1998, Federal Supreme Court Abu Dhabi page No 67

<sup>39</sup> UAE Civil Code of Procedures, Article No. 282

## CHAPTER THREE

*Chapter three includes Sources of Arbitrator powers to grant provisional powers, types of provisional measures, provisional measures and the seat of arbitration, the principle of concurrent jurisdiction which is adopted in several jurisdictions and the UNCITRAL Model Law which have been partially or fully adopted by more than 50 countries, the laws applicable to provisional measures, enforceability of provisional measures, the doctrine of compatibility and non waiver, provisional measures and res-judicata and ex parte provisional measures.*

### 3.1 Types of Provisional measures within construction industry:

The types of Provisional measures depend upon the purpose for which they are applied for are different forms in which Provisional Measures are applied for within the context of construction.

- “Order for security of cost.
- Order to appoint an Expert.
- Order to continue sales for distribution.
- Order to adhere to certain provisions of underlying contract which stipulates for payment, for instance a decision by DAB which has a temporary nature on the disputants.
- Order for testing or inspection of certain machinery or items including provisions of samples required for testing.
- Order for inspection of a construction site or manufacturing installation which might include an order to allow specialized Expert of the other disputant to access the Site.
- Order not to relocate or dispose of some evidences.
- Order not to locate certain asset or dispose of assets, subject of dispute.
- Order not to make public some information or not to divulge the confidentiality of an amicable dispute resolution mechanism.
- Order to abstain from holding a press conference or making a press release.
- Order not to call or encash Bank Guarantee.
- Order to continue or hold certain works which might include covering up of works performed which are points of dispute and the inspection of which will be important for the objective of finding a way out for the dispute.
- Order to order anti suit injunction<sup>40</sup>”

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<sup>40</sup> Nael G. Bunni, Working Group B Rules-Based Solutions to Procedural Issues, Page No. 10

### 3.2 Interim measures and the seat of arbitration.

Arbitrating parties might end up in a floating or stateless arbitration notably in an ad hoc arbitration. Some jurisdictions adopt the view that arbitral proceedings are delocalized from any municipal laws, but the theory of delocalized arbitration on the face of it seem amenable but in practice stateless arbitral proceedings are deprived from support of local courts which is unavoidable and crucial for instance in case of death or incapacity of the tribunal the only option available to the arbitrating parties is the support and corrosive powers of the local court.

In this regard the US Supreme Court held that the availability and unavailability of arbitral provisional measures is a decisive matter in forum shopping, hence if we were to sell UAE. As an international arbitration seat we got to have an arbitral provisional measure in line with international practice<sup>41</sup>.

### 3.3 The Principle of Concurrent Jurisdiction

This principle entails empowering courts and arbitrators alike to grant provisional measures.

One of the salient reasons of concurrent approach is that third party orders can be applied at the court to order for instance a bank not to accept a request for a call of a bond, restraining a bank from encashment of bank guarantee or performance bond pending deciding the merits of the case.

The UAE Civil Procedure Code, Federal Law No. (11) of 1992 is silent on the provisional measures, the only avenue available to arbitration parties is to seek orders from summary judge at the competent court, may be the most important advantage is the fact under UAE law moving party can apply to get interim relief ex parte, e.g. without giving notice to other disputant.

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<sup>41</sup> [www.jurispub.com/cart.php?m=product\\_detail&p=864](http://www.jurispub.com/cart.php?m=product_detail&p=864)

Moreover the arbitral tribunal has no coercive powers to injunction third parties to produce some evidence or to subpoena a witness to appear before the tribunal wherein in case of attachment of a bank guarantee or order a third party to refrain from doing something to do something that why international arbitral jurisprudence invariably commends concurrent jurisdiction of both national courts and arbitral tribunals. Therefore court involvement in arbitration does not only control procedural aspect of the arbitration process but also proactively help and boost efficacy of commercial international arbitration in event of incapacity or death of the tribunal notably in case of an ad hoc sole arbitrator where the involvement of court is quite inevitable in addition national courts are in better position to enforce provisional measures given the coercive power at the disposal of national judiciary in all jurisdictions.

Arbitral jurisprudence over the last decade came in support of the principle of concurrent jurisdiction; arbitral panels are in no position before being appointed to issue any orders in some instances it takes a few months to have the tribunal composed therefore involvement of the court is very essential and inevitable. Arbitral tribunals have no power vis -a vis third parties therefore a court's coercive power is of the substantial use. Unlike court injunctions which are self-executing provisional measures issued by arbitrators need to be enforced by the court<sup>42</sup>.

In event of adoption of the principle of concurrent jurisdiction there is a potential of negative and positive conflicts between jurisdiction of courts and arbitrators, a positive conflict of jurisdiction takes place when both courts and arbitrators assert that jurisdiction belongs to one of them and negative conflict of jurisdiction takes place when both of them deny that the jurisdiction belongs to the other<sup>43</sup>.

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<sup>42</sup> Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (13<sup>th</sup> Title International Arbitration Law Library, Kluwer Law International, 2005).

<sup>43</sup> Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (13<sup>th</sup> Title International Arbitration Law Library, Kluwer Law International, 2005) 105

### 3.4 The laws applicable to provisional measures .

The arbitration clause “the agreement to arbitrate, submission to arbitration or the terms of reference would determine the laws applicable to the provisions, however the laws of the seat of arbitration and mandatory rules will have overriding provisions likewise the laws of the where interim measures are to be enforced would have impact on the laws applicable to the provisional measures, this not to be confused with party autonomy as the arbitrating parties cannot contract around the mandatory rules at the seat of arbitration.

Christopher Booger proposes a checklist in connection with the laws applicable to arbitral interim measures (the tribunal when faced with an application for provisional measures should bring the following points into consideration<sup>44</sup> .

- “Have the arbitrating parties executed or agreed upon clear-cut agreement with respect to provisional measures or have they incorporated any arbitral rules.
- What are the provisions of *lex casuase* related to provisional measures that can govern the case in question.
- The availability of mandatory rules that overrides the agreement of the arbitrating parties
- In case arbitrating parties failed to agree on provisional measures or in case their agreement on interim measures is ambiguous, then dose the *lex arbitri* govern such measures.
- Whether or not the arbitral measures application admissible under the presumed or potential *lex executionis*, sometimes the place of enforcement imposes some restrictions for instance objective arbitrability in other words matters capable of resolution by arbitration wherein some countries do not allow arbitration of insolvency, dissolution of marriages, inheritance and the list goes on as per the public policy of each country.

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<sup>44</sup> Christopher Booger, ‘Conflict of Laws in International Arbitration’, Franco Ferrari, Stefan Kröll (eds) ( page No 460)

- For many practical reasons the parties may seek provisional interim measures from national courts in such case the court's jurisdiction is spell out in the lex fori, the procedure or the form in which provisional measures is governed by rules at the court own forum”.

### 3.5 Enforceability of provisional measures

The issue of enforcing arbitral measures is always thorny and there is always interplay between the laws of the seat and the laws of where the arbitral measures are to be enforced. The form of an arbitral measure is of paramount importance, so the question which poses itself should an order be issued in the form of an order, award, partial award or interim award in all cases the form in which an order is issued determines its enforceability different jurisdictions take different approaches, therefore there is no uniformity in granting provisional measures, generally speaking when measures are granted at the seat it is easy to enforce according to the law of the seat. As arbitrator orders are not self executing as court orders<sup>45</sup>.

### 3.6 The doctrine of compatibility and waiver under UAE Law.

*This principle finds its roots in the UNICTRAL Model Law:-*

*"Arbitration agreement and interim measures by court it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of Protection and for a court to grant such measure<sup>46</sup>."*

Under UAE law courts do not consider an application to provisional measures as a waiver or non compatible to arbitration agreement however the party sticking to an arbitration agreement should appear in the first hearing and plead existence of arbitration clause failing which the court can go ahead with hearing the case as per Article No 203/5 of The UAE Civil Procedure Code, Federal Law No. (11) of 1992 which stipulates that " If the parties to a dispute agree to refer the dispute to arbitration, no suit may be filed before the courts. Notwithstanding the foregoing, if one of the parties

<sup>45</sup> Phillip Capper, International Arbitration A Handbook (3<sup>rd</sup> Edition, Informa Professional, 2004)

<sup>46</sup> UNCITRAL Model Law, Article No. 9

files a suit, irrespective of the arbitration provision, and the other party does not object to such filing at the first hearing, the suit may be considered, and in such case, the arbitration provision shall be deemed cancelled<sup>47</sup>.

### **3.7 Provisional measures and Res Judicata:**

The very nature of provisional measures requires that they are temporary orders pending final decision on the merits in other words provisional measures are reversible orders in this regard Article No. 17 of the UNCITRAL Model Law stipulates that <sup>48</sup> "Article 17 D. Modification, suspension and termination. The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative."

The above-mentioned Article shows that provisional measures are reversible remedies which can be suspended, modified or terminated as the case may be.

### **3.8 Ex parte provisional measures under UAE law.**

Sometimes the element of surprise is badly needed in order to prevent a party from dissipating the assets as nowadays funds or assets can be transferred electronically to another jurisdiction rendering a subsequent award moot. Therefore ex parte measures, those measures made without a notice to other disputants, and this one of the reasons which support the proponents of court ordered provisional measures at the seat of arbitration but in terms of overseas provisional measures there is a doubt as to the enforceability of such ex parte measure and the subsequent challenges to the enforcement under New York convention for lack of due process which is enshrined in Article No. (Article V b) "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or "Article V, Paragraph 1-b of the New convention, allow judge at the seat to refuse recognition and enforcement on ground of lack of due process, absent

<sup>47</sup> UNCITRAL Model law, Article No 9

<sup>48</sup> UNCITRAL Model law, Article No 17 D

MITS or BITS allowing for enforcement and recognition of provisional and concurrent approach to authorize court-ordered arbitral provisional measures and arbitrator order provisional measures in aid of international commercial arbitration<sup>49</sup>.

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<sup>49</sup> New York Convention on Recognition and Enforcement of foreign arbitral awards

## CHAPTER FOUR

*Chapter Four looks at provisional measures under the UNCITRAL Model Law and the UNCITRAL Model Rules then provisional measures under the arbitration rules of Dubai International Arbitration Center (DIAC), provisional measures under the Arbitration Rules of DIFC / LCIA, ICC, AAA, International Center for Settlement of Investment Disputes (ICSID), China International Economic Trade Arbitration Commission (CIETAC), Egyptian Arbitration Act No. 27 of 1994, Sudanese Arbitration Act of 2005, LCIA and English Arbitration Act of 1996.*

*The significance of the UNCITRAL Model Law stems from fact the UNCITRAL Model Law has been adopted by more than 50 countries around the globe.*

#### **4.1 Arbitral interim measure under United National Commission on International Trade Law (UNCITRAL) Model Law**

*“Section 1. Interim measures*

*Article 17. Power of arbitral tribunal to order interim measures*

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

*“Article 17 A. Conditions for granting interim measures*

- 1) The party requesting an interim measure under Article 17(2)(a), (b) and
  - a) shall satisfy the arbitral tribunal that:
  - b) 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
  - c) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

- 2) With regard to a request for an interim measure under Article 17 (2) (d), the requirements in paragraphs (1)(a) and (b) of this Article shall apply only to the extent the arbitral tribunal considers appropriate”

Availability of ex parte provisional measures under the UNCITRAL Model Law.

*Section 2. Preliminary orders*

*Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders*

- 1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
- 2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
- 3) The conditions defined under Article 17A apply to any preliminary order, provided that the harm to be assessed under Article 17A (1) (a), is the harm likely to result from the order being granted or not.

*Article 17 C. Specific regime for preliminary orders*

- 1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for *Part One. UNCITRAL UNCITRAL UNCITRAL Model Law on International Commercial Arbitration* 11 the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
- 2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practical time.

- 3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.
- 4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
- 5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award<sup>50</sup>.

Preliminary orders provide some of form of ex parte measures.

*Section 3. Provisions applicable to interim measures and preliminary orders*

*Article 17 D. Modification, suspension, termination*

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

*Article 17 E. Provision of security*

- 1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
- 2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so<sup>51</sup>.

Article 17/1 reconfirm party autonomy to agree to empower arbitral tribunal to grant provisional measures, while Article 17/2 shows that a provisional measure can be in a form of award and this is facilitate enforceability of provisional measures.

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<sup>50</sup> UNCITRAL MODEL LAW, [www.uncitral.org/uncitral/](http://www.uncitral.org/uncitral/) last visited on 14-02-2013

<sup>51</sup> UNCITRAL MODEL LAW, [www.uncitral.org/uncitral/](http://www.uncitral.org/uncitral/) last visited on 14-02-2013

Article 17/2a shows the purpose of provisional measures in restoring the status quo till determination of the dispute while Article 17/2b provide for refraining from an action which cause imminent or current harm or prejudice to the arbitral process.

Article 17A set out the conditions for granting provisional measures, the moving party should convince the tribunal that harm would not be adequately reparable by an award and this is typically in case of dissipation of assets or moving of assets out of jurisdiction rendering a subsequent award moot.

Whether Article 17C stipulates that the moving party will likely succeed on the merits of the case.

Another important point is provided for under section 2 under the title of preliminary orders which allow granting of ex parte provisional measures in other words provisional measures issued without notice to the other disputant.

Article 17C provide mechanism for provisional orders that a preliminary order should expire after 21 days and the tribunal is empowered to issue an interim measure adopting or modifying the preliminary order, however a preliminary order is binding on the parties but it's not subject to court enforcement as provided for in the UNCITRAL Model Law, it does not constitute an award.

Section 3 Article 17D provide for suspension modification or termination of preliminary order and this is will be on the own motion of tribunal or as a request of a party.

Article 17E provides for security against granting of provisional measures and this will prevent the moving party from applying for unmeritorious and vexatious. Nonetheless the granting of such orders for within the discretion of the tribunal as they deem appropriate.

## 4.2 Arbitral interim measure under UNCITRAL Rules

The UNCITRAL Rules are equally important and they are invariably incorporated in ad hoc arbitration worldwide and are laid down as standard rules to be followed for arbitration institution.

### *Article 26 of the UNCITRAL Model Law*

1. "The arbitral tribunal may, at the request of a party, grant Interim measures.
2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
  - a. Maintain or restore the status quo pending determination of the dispute;
  - b. Take action that would prevent, or refrain from taking action that is likely to cause,
    - (i) Current or imminent harm or
    - (ii) Prejudice to the arbitral process itself;
  - c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or
  - d. Preserve evidence that may be relevant and material to the resolution of the dispute.
3. The party requesting an interim measure under paragraphs 2.
  - a) to (c) shall satisfy the arbitral tribunal that:
  - b) 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
  - c) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not

affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.
5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.
6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.
8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
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<sup>52</sup>.

Article 26/1 of the UNCITRAL Model Law empowers the tribunal to grant interim measures at the request of a party and clause 26/2 states that interim measure is temporary and reversible clause 2a up to clause 2d remunerates the purpose of the interim measures which range from maintaining or restoring status quo and take action that would prevent current or imminent harm prejudice the arbitral process, preserve evidence or provide a way for preserve assets to secure latter enforcement.

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<sup>52</sup> UNCITRAL MODEL RULES [www.uncitral.org/uncitral/](http://www.uncitral.org/uncitral/) last accessed on 04/04/2013

Clause 3a upto 3c stipulates requirements for granting the measures which include inter area irreparable harm which irremediable by a subsequent award and that the harm would outweighs the harm which probably to befall the party against whom an interim measure is made in case a provisional measure is not issued and that there is a chance the moving party will succeed on the substance of the claims and that the eventual outcome of the award will not be affected by such measure in terms of discretion of the arbitral tribunal decision making mechanism.

Clause 5 stipulates that provisional measures may be terminated or modified or suspended upon request of moving party or on the motion of the tribunal itself.

Clause 6 stipulates that the arbitral panel may request a security as regards the measure.

Article No. 9 and application for a provisional measures does not prevent a moving party from applying to the court and this is again reiterate the principle of concurrent jurisdiction and non waiver of arbitration agreement.

#### **4.3 Provisional Measures under the Arbitration Rules of Dubai International Arbitration Center (DIAC)**

DIAC is a senior regional arbitration center seated in Dubai – UAE. The rules provide that as a request of a party the tribunal may issue any provisional orders or take any interim or conservatory measures, but in practice the arbitral tribunals always take the application to the court notably in case of attachment of property or funds which is subject to Article 235 of UAE Code of civil procedures and such provisional measures fall within the discretion of the summary judge as provided for in chapter two, Page No. 14 though the parties may contractually agree to vest the tribunal with whatever powers to grant provisional measures as per the principle laid down by court of cassation Dubai but I believe in order to have an effective provisional measure regime the arbitration law need to be amended in line with

international practice notably the introduction of concurrent jurisdiction to give arbitration efficacy.

In order to give more efficacy to DIAC concurrent approach to be adopted in order to allow arbitrators to issue injunctive relief.

Article No. 31.2 envisage that order may take the form of interim or provisional award but there is doubt as to enforceability of the same whether under New York Convention or even in local court as it could be subject to a challenge by the opposing party, however Article 31.3 of DIAC rules reconfirm the doctrine of non-waiver or incompatibility when submitting application for provisional measures at the competent court.

#### **“Article (31)**

##### **Interim and Conservatory Measures of Protection**

- 31.1 Subject to any mandatory rules of the applicable law, at the request of a party, the Tribunal may issue any provisional orders or take other interim or conservatory measures it deems necessary, including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods. The Tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party.
- 31.2 Measures and orders contemplated under this Article may take the form of an interim or provisional award.
- 31.3 A request addressed by a party to a competent judicial authority for interim or conservatory measures, or for security for the claim or counter-claim, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed incompatible with, or a waiver of, the Arbitration Agreement.
- 31.4 Any such request and any measures taken by the competent judicial authority must be notified without delay to the Centre by the party

making such a request or seeking such measures. The Centre shall inform the Tribunal thereof<sup>53</sup>.”

#### 4.4 Provisional Measures under the DIFC/LCIA.

It is to be noted that the DIFC / LCIA are common law inspired initiative but the rules of DIFC / LCIA are not typically similar to LCIA rules in London, moreover the English Arbitration Act of 1996 give the courts wide ranging powers in support of Arbitration, the upcoming UAE arbitration law should bring into consideration international practice in terms of granting and enforcing of provisional measures. For instance the current practices under English Arbitration, there are orders known as Marvea Injunction<sup>54</sup> and Anton Piller<sup>55</sup>

However enforcement of awards and any orders issued by DIFC / LCIA are governed by protocol No. 34-2009, Protocol of Enforcement between the Dubai Courts and DIFC Courts.

The DIFC Arbitration stipulates that the DIFC court adhere to the provisions of any conventions or treaty to which UAE is a party as regards execution of decisions,

“Additionally, the Law includes a provision aimed at ensuring that awards made within the jurisdiction of the DIFC are enforced by the Dubai courts without further review of the tribunal's decision “<sup>56</sup>.

It is positive that under refer to protocol Dubai Courts will have no recourse against the merits of awards issued under DIFC / LCIA.

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<sup>53</sup> Dubai International Arbitration Center,  
<http://www.diac.ae/idias/rules/Arb.Rules%202007/4THE%20PROCEEDINGS/>  
 Last visited 15-02-2013

<sup>54</sup> Available on <http://www.lawteacher.net/english-legal-system/essays/mareva-injunction.php> an interlocutory orders Unique to English law , it aims at preventing a defendant from making an award or a judgment ineffective by moving assets from jurisdiction to another last accessed on 12/3/2013

<sup>55</sup> A court ex parte injunction allowing the plaintiff to have access to the premise of the defendant to obtain evidence Journal of International Commercial Law and Technology Vol. 2, Issue 3 (2007) Page No. 5

<sup>56</sup> Protocol of Enforcement Signed between Dubai Court and DIFC Courts Available on [www.difc.ae](http://www.difc.ae) last accessed on 08-03-2013

## **Article 25 Interim and Conservatory Measures**

25.1 “The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

- (a) To order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;
- (b) To order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and
- (c) To order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

25.2 The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such claimant or counterclaimant in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards. In the event that a claiming or

counterclaiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims or counterclaims or dismiss them in an award.

- 25.3 The power of the Arbitral Tribunal under Article 25.1 shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal and, in exceptional cases, thereafter. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated by the applicant to the Arbitral Tribunal and all other parties. However, by agreeing to arbitration under these Rules, the parties shall be taken to have agreed not to apply to any state court or other judicial authority for any order for security for its legal or other costs available from the Arbitral Tribunal under Article 25.2<sup>57</sup>."

#### **5- Provisional Measures under the Arbitration Rules of ICC**

The ICC rules of arbitration entitle a moving party to apply to a national court. Clause 2 of the ICC rules stipulates that arbitration to a national court is neither incompatible nor a waiver of the agreement to arbitrate<sup>58</sup>.

ICC rules are invariably incorporated by reference in institutional and ad hoc arbitration in UAE in this regard the Dubai court of Cassation held that "reference FIDIC contracts in a construction agreement that to settle disputes between an employer and a contractor, suffices to prove agreement of contracting parties refer dispute to arbitration<sup>59</sup>.

"Article 28: Conservatory and Interim Measures

- 1) Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems

<sup>57</sup> DIFC Arbitration, [http://www.difcarbitration.com/arbitration/rules\\_clauses/index.html](http://www.difcarbitration.com/arbitration/rules_clauses/index.html) Last accessed on 22-02-2013

<sup>58</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2005) Ch 9, 311.

<sup>59</sup> Rafat Shaban , *Arbitration Practice* , page No 558 , Bin Dasmal printing press , 2009 , Challenge No 462/2002 hearing dated 2/3/2001 Dubai court of cassation

appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.

- 2) Before the file is transmitted to the arbitral tribunal and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof<sup>60</sup>.”

Under ICC rules once the file is transferred then the tribunal at the request of the party may order any provisional measure and such measures will be subject to security, such an order under ICC rules will take the form of an award and such description might give it a chance of enforcement but always ICC awards are subject to scrutiny and this is not applicable to provisional measures.

However under Article 28/2 the parties may apply to any court to grant conservative measures and here you can see ICC adopts the principle of concurrent jurisdiction and non waiver and we can see that all provisional measures must be referred to ICC Secretariat.

#### **“Article 29: Emergency Arbitrator**

- I. A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (“Emergency Measures”) may make an application for such measures pursuant to the Emergency

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<sup>60</sup> Available on [http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/#article\\_28](http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/#article_28)

Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.

- II. The emergency arbitrator's decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.
- III. The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.
- IV. The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.
- V. Articles 29(1)–29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the “Emergency Arbitrator Provisions”) shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.
  - The Emergency Arbitrator Provisions shall not apply if:
  - The arbitration agreement under the Rules was concluded before the date on which the Rules came into force;
  - The parties have agreed to opt out of the Emergency Arbitrator Provisions; or
  - The parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.
  - The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter,

pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.”

There could be an urgent need of a provisional measure before competition of the tribunal and transferring of the file, therefore to fill this gap the ICC introduce the concept of an emergency arbitrator. An emergency arbitrator is typically appointed before composition of the tribunal to respond to application for urgent matters and any decision will be issued by an emergency arbitrator will take the form of an order but we can see that the decision of an emergency arbitrator can be confirmed or modified or cancelled by the tribunal once it is in place but still the parties can opt in or opt out of emergency arbitrator under ICC and still can apply to judicial authority.

The Cost of an Emergency Arbitrator Proceeding is US\$ 40,000<sup>61</sup>.

## **6- Provisional Measures under the Arbitration Rules of AAA**

“R-34 Interim Measures\*\*

- a. The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property
- b. And disposition of perishable goods.
- c. Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
- d. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate<sup>62</sup>.”

<sup>61</sup> Available on [http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/#article\\_28](http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/#article_28) Last accessed on 28-02-2013

Given the fact that there is bilateral or multilateral enforcement agreement between UAE and the US, arbitration remains the only practical mechanism of dispute resolution involve an American company. The AAA Rules empowers arbitral tribunal to take whatever provisional measures. They deem appropriate and against a security, moreover AAA underlines the principal of concurrent jurisdiction.

Another feature of AAA Rules is optional rules for emergency arbitrator this is where the tribunal has not been appointed and this will solve the problem of powerlessness or paralysis of tribunal before compositions.

## **OPTIONAL RULES FOR EMERGENCY MEASURES OF PROTECTION**

### **O-1: Applicability**

Where parties by special agreement or in their arbitration clause have adopted these rules for emergency measures of protection, a party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile transmission, or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.

### **O-2: Appointment of Emergency Arbitrator**

Within one business day of receipt of notice as provided in Section O-1, the AAA shall appoint a single emergency arbitrator from a special AAA panel of emergency arbitrators designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed in the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the

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<sup>62</sup> Available on [www.adr.org](http://www.adr.org) and last accessed on 19-03-2013

communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

### **O-3: Schedule**

The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone conference or on written submissions as alternatives to a formal hearing.

### **O-4: Interim Award**

If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief and that such party is entitled to such relief, the emergency arbitrator may enter an interim award granting the relief and stating the reasons therefore.

### **O-5: Constitution of the Panel**

Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.

### **O-6. Security**

Any interim award of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

### **O-7. Special Master**

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to

nominate a special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in Section O-1 of this Article and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

### **O-8. Costs**

The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the panel to determine finally the apportionment of such costs<sup>63</sup>."

## **7- Provisional Measures under the Arbitration Rules of International Centre for Settlement of Investments Disputes (ICSID)**

### **International Centre for Settlement of Investments Disputes (ICSID)**

ICSID is an arbitration arm of the World Bank, headquartered in Washington, USA.

The UAE is a contracting state to International Centre for Settlement of Investments Disputes (ICSID), the UAE joined the Convention on Jan. 22, 1982<sup>64</sup> the arbitration arm of the World Bank the convention jurisdiction provides an excellent mechanism of settlement of investment dispute between state and national of other states

The rules of International Centre for Settlement of Investments Disputes (ICSID) stipulate that the arbitral tribunal can recommend granting of arbitral interim measures:- "Chapter V Particular Procedures Rule 39 Provisional Measures" At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

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<sup>63</sup> Ibid

<sup>64</sup>

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>

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

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

The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests<sup>65</sup>.”

Under the ICSID rules the tribunal can recommend provisional measures on its own motion the significance of the ICSID rules springs from the fact the under the rules a contracting stating should consider the award as a judgment issued from local court without recourse to any procedures. Moreover an arbitration conducted under ICSID has the support and implied influence of the World Bank, provisional measures granted by an ICSID tribunal sometime are so onerous, in one case an ICSID tribunal authorized an interim measures to restrain Ecuador from selling assets of a French company operating in oil, the case can be summed up that Ecuador was seeking USD 327 million in windfall tax while the French Company contends that the tax is in violation of the an Investment treaty, the ICSID tribunal held that although the ICSID rules authorize the tribunal to recommend

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<sup>65</sup> Available on <https://icsid.worldbank.org/ICSID> last visited on 25-02-2013

provisional measures but such recommendation have legal consequences<sup>66</sup> eventually Ecuador withdrew from the International Centre for Settlement of Investments Disputes (ICSID) the lesson which can be learned here from this arbitral law case is that the arbitral provisional measures are taken seriously by ICSID tribunals.

Under ICSID provisional measures arbitrators are authorized to recommend on their own motion provisional measures. The ICSID arbitration is very important more than 150 countries all over geographical areas of the world have ratified ICSID. ICSID is currently administering more than 100 International Arbitration cases worth \$30 Billion<sup>67</sup>.

A quick scan of the ICSID rules show that nothing in the rules prevent the parties from applying to any judicial authority for any interim leave and this goes on to show that applying to a National Court is not a waiver nor incompatible with the agreement to arbitrate moreover this reconfirm the concurrent jurisdiction approach wherein both courts and tribunals can act in tandem.

## **8- Provisional Measures under the Arbitration Rules of China International Economic Trade & Arbitration Commission (CIETAC)**

### **CIETAC Arbitration Rules**

There are over 200 arbitration centers in China; CIETAC is the most famous one of them. There is substantial trade exchange between China and UAE.

Article 17 and Article 18 of the *CIETAC Arbitration Rules* provide as follows:  
In case arbitration is conducted under *CIETAC Arbitration Rules* arbitrators *have no powers to grant provisional measures the same rests with the competent court.*

"Article 17 Preservation of property

<sup>66</sup> <https://icsid.worldbank.org/ICSID/>

<sup>67</sup> Gary B. Born, *International Commercial Arbitration* [Kluwer Law International, 2009] 151

"17. When any party applies for preservation of property, the CIETAC shall forward the party's application for a ruling to the competent court at the place where the domicile of the party against whom the preservation of property is sought is located or where the property of the said party is located."

Based on the Article 17 of CIETAC rule it is clear that a moving party will have to submit the file to the CIETAC which in turn forward to the competent court and not to the arbitrators as such Chinese Court have exclusive jurisdiction to grant injunctive relief.

Article 18 Protection of evidence

"When a party applies for the protection of evidence, the CIETAC shall forward the party's application for a ruling to the competent court at the place where the evidence is located<sup>68</sup>."

It is to be noted that under Chinese law an ad hoc arbitration is not allowed, arbitration should be through a commission<sup>69</sup>.

### **9- Provisional Measures under the Egyptian Arbitration Act No. 27 of 1994**

The Egyptian law and jurisprudence play an important role in most Arab countries legal system, the Egyptian Arbitration Law adopts the principle of concurrent jurisdiction as under:

"Article (24)

1. The parties to arbitration may agree that the arbitral tribunal shall be entitled pursuant to a request by one of them, to order either party to take whatever provisional or conservatory measures it deems, the nature of the dispute requires, as well as to demand the presentation of an adequate guarantee to cover the expenses of the measures it orders.

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<sup>68</sup> Available on [http://www.cms-china.info/insight/2012/03/China-Insight\\_Dispute\\_Resolution.html](http://www.cms-china.info/insight/2012/03/China-Insight_Dispute_Resolution.html)  
Last accessed on 05-03-2013

<sup>69</sup> Prof. Philip Capper [Oxford Weekend, 2012]

2. If the party to whom the order is issued defaults on executing it, the arbitral tribunal may, at the request of the other party, allow the letter to take the procedures necessary for execution, without prejudice to that party's right to apply to the president of the court referred to in Article (9) of this law for an enforcement order<sup>70</sup>.”

**10- Provisional Measures under the Sudanese Arbitration Act of 2005**  
**the Sudanese Arbitration Act of 2005 in Article No. 11 provides thus:-**

**Provisional Measures:**

Any one of the arbitrating parties may request Court or Tribunal to take provisional measures during arbitration proceedings

The Sudanese arbitration law as well adopts the principle of concurrent jurisdiction as follows:

We find that the Sudanese adopted the principle of concurrent jurisdiction enshrined in the UNCITRAL Model Law, though law dose note address the issue of foreign seated arbitral orders and ex parte interim measures in connection with arbitration proceedings<sup>71</sup>.

**11- Provisional Measures under the LCIA**

“Article 25 Interim and Conservatory Measures

25.1 The Arbitral Tribunal shall have the power, unless otherwise agreed by the parties in writing, on the application of any party:

- (a) To order any respondent party to a claim or counterclaim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the

<sup>70</sup> Available On [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=205194](http://www.wipo.int/wipolex/en/text.jsp?file_id=205194) Last accessed on 11-03-2013

<sup>71</sup> Dr. Ibrahim Draig, Domestic & International Arbitration (Sudan Printing Co, 2008) 135.

provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;

- (b) To order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and
- (c) To order on a provisional basis, subject to final determination in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

25.2 The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such claimant or counterclaimant in providing security. The amount of any costs and losses payable under such cross-indemnity may be determined by the Arbitral Tribunal in one or more awards. In the event that a claiming or counterclaiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims or counterclaims or dismiss them in an award.

25.3 The power of the Arbitral Tribunal under Article 25.1 shall not prejudice howsoever any party's right to apply to any state court or other judicial authority for interim or conservatory measures before the formation of the Arbitral Tribunal and, in exceptional cases, thereafter. Any application and any order for such measures after the formation of the Arbitral Tribunal shall be promptly communicated by the applicant to the Arbitral Tribunal and all

other parties. However, by agreeing to arbitration under these Rules, the parties shall be taken to have agreed not to apply to any state court or other judicial authority for any order for security for its legal or other costs available from the Arbitral Tribunal under Article 25.2<sup>72</sup>.”

The LCIA rules enshrine principle of party autonomy however the rules provide for ordering a respondent to provide security for all or part of the amount subject of dispute. In clause (b) there is wide ranging a remedy which includes disposal of any property or preservation or sale or storage of a property. Moreover, LCIA rules provide for security for legal cost either by the counter claimant or claimant.

Again in line with the UNCITRAL Model Law Article 25.3 provides for concurrent jurisdiction where in an application to judicial authority does not mean waiver of the arbitration clause.

## **12- Provisional Measures under the English Arbitration Act of 1996**

Under the English Arbitration Act 1996 the court role is confined to aiding the arbitral panel and the court will be in a position to act in cases where the panel is not empowered to do so or in case of urgency<sup>73</sup>.

Allows the arbitral panel to issue orders provisionally but this power is exercisable with the express consent of the arbitrating parties<sup>74</sup>.

The English Arbitration Act empowers the Arbitral tribunal in the absence of contrary agreement by the parties certain powers to make peremptory orders<sup>75</sup>.

The English Arbitration Act is invariably incorporated in ad hoc arbitration held in UAE.

As per the English Law a party can apply to a court for provisional measures under section 44(2)(e) of the arbitration act 1996, a moving party can apply

<sup>72</sup> Available on <http://www.lcia.org/Default.aspx> Last accessed on 19-03-2013

<sup>73</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2005) Ch 9, 315.

<sup>74</sup> English Arbitration Act 1996, s 39.

<sup>75</sup> English Arbitration Act 1996, s 41.

for conservative measures despite the fact that the arbitration is outside the jurisdiction of the English Courts<sup>76</sup>.

The English Law embraces the concept of worldwide freezing orders, such order will be granted only when the seat of arbitration is Northern Ireland, England or Wales<sup>77</sup>.

- 1) Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.
- 2) An application for an order under this section may be made;
  - a) by the tribunal (upon notice to the parties),
  - b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or
  - c) Where the parties have agreed that the powers of the court under this section shall be available.
- 3) The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.
- 4) No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.
- 5) The leave of the court is required for any appeal from a decision of the court under this section<sup>78</sup>."

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<sup>76</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2005) Ch 9, 300

<sup>77</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2005) Ch 9, 301

<sup>78</sup> English Arbitration Act 1996, s 42.

The English Arbitration Act empowers the tribunal with broad powers which includes photography, preservation, inspection, detention or custody of any property, preservation of documentary evidence or taking of samples, the English arbitration act empowers the court to issue freezing order where the seat or arbitration is in England, Wales or Northern Island which are known as worldwide freezing orders or Mareva Injunction<sup>79</sup>.

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<sup>79</sup> Andrew Tweeddale & Keren Tweeddale, *Arbitration of Commercial Disputes* (Oxford University Press 2005) Ch 9, 315.

## Chapter Five

### 1- Conclusions

The present position under UAE seated arbitrations is that arbitrators are not vested with powers to grant provisional measures under the *lex arbitri*. Theoretically, the Arbitral Institution Rules in UAE provide for granting of provisional measures by arbitrators but in practice the matter rests with the arbitrating parties to agree contractually to empower the arbitral tribunal to grant provisional. Alternatively the other available recourse is to apply through litigious proceedings with the Department of urgent Matters & Execution at Dubai court wherein the moving party may submit an interlocutory application for an injunctive relief at any stage before or during composition of the arbitral tribunal and such an application might be granted or withheld and will undergo a litigious proceedings including three stages of litigations, e.g. court of first instance, court of appeal and the court of cassation.

Foreign seated orders are dealt with according to Article No. 235 of the UAE. Code Civil Procedures, BIT & MITS to which UAE is a signatory; however New York Convention does not provide for a mechanism of enforcement of arbitral provisional measures as it deals with final awards. Dubai Court of Cassation held that if there is no convention or treaty covering provisional measures then UAE court applies the principle of reciprocity.

Court intervention is essential in case of *ex parte* provisional measures and in case of third party as the arbitration agreement binds the arbitrating parties only moreover in case of death, sudden untimely resignation of arbitrators or incapacity of an arbitral tribunal during the heat of the arbitral process the intervention of national court is very essential to safeguard and protect the rights at stake of the arbitrating parties.

Based on the outcome of the interviews conducted with the interviewees, most if not all interviewees who are coming from several back grounds are of the opinion that the arbitral tribunals or arbitral institutions in UAE have no coercive or sanctioning powers to enforce their provisional measures

therefore the competent court remain the best forum for enforcement for arbitral provisional measure while provisional measures issued by national courts are typically self-executing unless otherwise challenged, suspended or terminated.

We have to differentiate between three distinctive issues.

- The power to grant provisional measures;
- The power to enforce provisional measures;
- The power to compel enforcement;

The power to grant provisional measures should be concurrent jurisdiction.

The power to enforce provisional measures should rest with judiciary.

The power to compel enforcement that is the coercive sanctioning power should rest with national courts, which have all logistical capability and necessary tools to enforce their injunctions.

## **2- Recommendations:**

To the arbitrating parties within UAE context;

In order to avail of the benefits of the provisional measures your in-house or front end attorney should agree with the your contracting parties contractually before a dispute arises wherein you feel that your vested interests are stake and accordingly incorporate by reference the right institutional rules, the rights lex arbitri and the right substantive laws and above all the seat of arbitration should be arbitration friendly so the wording of arbitration clause which bring into consideration such relevant points will suffice the moving party in case a need arises. Experience show that a well negotiated arbitration clause will suffice the aggrieved party the risks involved in making your disputant at a later stage agree on an arbitration submission or terms of reference all of which take place after the dispute arises out, it is to be reiterate in this regard the Dubai Court of Cassation has set a principle the essence of which, the arbitrating parties with due regard to party autonomy and subject to any mandatory rules and public

policy can contractually agree to vest with an arbitral tribunal the power to grant provisional measures and choose the proper law of the contract, the rules of arbitration and the *lex arbitri*, though in practice in case of choice of a substantive law other than UAE law then the moving party should submit a legally translated version of the foreign law duly attested and with reference to the particular Articles applicable to the dispute.

Absent such an arrangement then the moving party is left with no option other than going through the litigious course as set out in this paper in Chapter No. (2) which entails three stage litigations and the granting or denial of provisional measures rests with the discretion of the trial court.

#### Recommendations to the drafters of upcoming UAE arbitration law

In line with the structured approach of UNCITRAL Model Law on International Arbitration, drafted by the United Nation Commission on International Trade Law which has been adopted fully or partially by more than 50 countries and scholarly opinions and arbitral jurisprudence in verbally recommends adoption of concurrent jurisdiction

*It is worth mentioning that Egyptian Arbitration law No 27 of 1994 provide for concurrent jurisdiction<sup>80</sup> the same stance is taken by the Sudanese Arbitration law of 2005 which provide for concurrent jurisdiction<sup>81</sup>. The UNCITRAL Model Law should be adopted and customized to the local requirements and one of the salient features is adoption of concurrent jurisdiction to empower arbitral tribunal and the court alike to grant provisional measures taking into consideration the nature of the provisional measures prayed for and the relief sought. Despite the fact the arbitral tribunal invariably disposes of the merits of the underlying dispute and there is no recourse against the merits and challenge on procedural grounds only as per New York Convention which provide for worldwide recognition and*

<sup>80</sup> available on [www.uncitral.org/uncitral/en/](http://www.uncitral.org/uncitral/en/) last accessed on 24-03-2013

<sup>81</sup> Dr. Mohamed Mahir and Dr. Atif Mohamed Arbitration Practice an analytical study for jurisprudence and supreme constitutional court, Page No. 863, Cairo University Printing Press.

enforcement of awards, while in practice arbitral tribunal is sometimes unable to act due to mandatory rules or public policy consideration as such the coercive powers of municipal courts are always required to give arbitration efficacy for instance the death or incapacity of a sole arbitrator put the entire interest of the parties at stake and might lead to the classical examples of leaving the aggrieved party remediless, dissipation of assets or destruction of evidences rendering an eventual award moot .

Moreover due to the principle of privity of contract an arbitration agreement binds the party to the contract only hence arbitral tribunal are in no position to order third party while, national courts has inherent power to order whomsoever to appear or produce evidence or to adhere to an injunctive relief.

The adoption of the principle of concurrent jurisdiction essentially requires the introduction of the concept of Emergency Arbitrator as provided for in ICC optional Rules and AAA optional Rules as some arbitrating parties due to confidentiality concerns do not like to go to court owing to the publicity of court proceedings.

An electronic system can be introduced in order to process an application for provisional measures wherein the system will electronically process the applications and the moving party undertakes not to submit double application. Such a system could have an option for processing of an application which allow for applying to court ordered or arbitrator ordered provisional measures with reference number for latter transaction on the same application, the same method can be used for an emergency arbitrator applications.

The issue of enforcement of provisional measures, due to logistical considerations should rest with the national courts given the coercive powers of municipal courts and this confirmed by various approach of different jurisdiction on this issue.

The availability or non availability of provisional measures is of paramount significance in international commercial arbitration as per the American Supreme Court the availability or non availability of provisional measures lead to forum shopping, so if we were to sell UAE as an international seat of arbitration, there should be robust provisional measures infrastructure wherein the arbitrating parties can opt in or opt out contractually of the concurrent jurisdiction as per their arbitration clause or terms of reference , arbitrating parties invariably select a seat where national court are arbitration friendly and the court provide a package of services on the top of which comes the issue of provisional measures and the this would enhance competitiveness of UAE in terms of foreign investments attraction.

The agreement of the arbitrating parties should be given effect and this will be attained by enactment of concurrent jurisdiction to fill the legislative lacuna in the present arbitration law in UAE.

### **Recommendations to Arbitral Tribunal**

Matters which should to be brought into consideration when making a decision whether or not to order photographing or inspection of a property, preservation or attachment of a property by an expert, a party or an arbitral tribunal.

Admittedly granting of provisional measures experience show is instrumental and sometimes beneficial or detrimental to the interest of one of the arbitrating parties based on this hard facts the Clarb recommends some practice guideline as under:

“a- There is a difference between orders related to photographing and inspection of a property on one hand and order related to custody, attachment by an expert, an arbitral tribunal or an arbitrating party, the fact that an application for attachment of a property potentially endanger the other disputant can cause more harm than an application for mere photocopying or inspection of a property, therefore maximum caution ought to be exercised when granting such order.

b- Arbitral tribunal should exercise maximum care when granting order for custody or attachment or detention of a property to guarantee that there is no miscarriage of justice, despite the fact that provisional measures are essentially reversible but an arbitral tribunal should bear in mind that sometimes a provisional measure might constrain an affected disputant to abandon arbitration as the attachment or a detention of a property could have serious far reaching repercussions on the business of one of the arbitrating party who might need to sell, lease or mortgage the property subject of a potential attachment, therefore it is advisable to the arbitral tribunal to decline to respond to such an application given the adverse affect and the onerous hardship that might befall the affected party and the lack of a practical alternative.

Requesting a security against granting of provisional measures might be good approach to avoid and prevent unmeritorious vexatious applications as provided for under of UAE Code of Civil Procedures to avoid these unmeritorious applications the moving party should be requested to submit personal guarantee of shareholders in case of limited liability company and each case should be judged on its own merits<sup>82</sup>.”

As per the practice of Dubai courts Provisional measures are discretionary remedy and essentially all applications are not treated on equal footing, therefore each application should be judged on its own merits with due regard to mandatory rules, contracting parties agreement and the principles laid down by the court of cassation Dubai and supreme Federal Court Abu Dhabi .

When granting an offshore provisional measure within the context of international arbitration special caution must be exercised when granting ex parte provisional measures which might affect enforceability of eventual

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<sup>82</sup> Available on [www.ciarb.org/.../Practice](http://www.ciarb.org/.../Practice) last visited on 22/2/2013

award on grounds of lack of due process and treatment of the arbitrating parties equally as enshrined in New York convention.

The New York Convention needs to be revitalized by addition of more provisions like those provided for in UNCITRAL Model Law notably provisions related to interim measures and ex parte inter interlocutory relief in order to give arbitration more efficacy with regard To the UAE seated arbitral institutions.

In order to make UAE as an attractive situs for international commercial arbitration state of the arts arbitration rules should be adopted notably optional rules for emergency arbitrators and scrutiny of arbitral awards and provisional measures under arbitrations administered by the centre to protect the rights of the arbitrating parties pending decision of the merits of the case for ad hoc, institutional or court ordered arbitrations seated in UAE.

If we were to look at arbitration laws as a structure then its under structure will be the Lex arbitri “arbitration law” and the superstructure will be arbitration rules, it goes without saying that a sound legal infrastructure notably arbitration laws will enhance the practice of arbitration in UAE , it is hoped that the upcoming UAE arbitration law would accompany the best practice in arbitration on the basis of scholarly opinions, input of relevant stakeholders, arbitral jurisprudence and introduce new concepts like concurrent jurisdiction, provide for pre-award injunctive relief by arbitrators and update arbitration laws in line with state of the art law, in such a way UAE will establish a benchmark for arbitration not only for domestic arbitration but also for the region and MENA as a whole .

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