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COURT ORDERED INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

Vianney Sebayiga*

Abstract

The jurisdiction of Kenyan courts in granting interim measures in foreign-seated arbitrations remains a subject of judicial divergence. In Skoda Export Limited v Tamoil East Africa Limited, the High Court held that it lacked jurisdiction. However, in CMC Holdings Limited & CMC Motors Group Limited v Jaguar Land Rover Exports Limited and Isolux Ingeniera S A v Kenya Electricity Transmission Company Limited & 5 others, the courts held that the High Court has concurrent jurisdiction with the courts at the seat in granting interim measures in support of foreign-seated arbitrations. This paper examines this controversial issue, arguing that while courts at the seat have primary jurisdiction, their jurisdiction is not exclusive; other national courts also have concurrent jurisdiction to grant interim measures. It proposes criteria for courts to consider when determining whether to exercise jurisdiction in granting interim measures for foreign-seated arbitrations.

1.0 INTRODUCTION

Consent is the cornerstone of arbitration and embodies the autonomy of parties to choose how their disputes will be resolved.[1] It also enables parties to choose their preferred seat of arbitration directly or indirectly.[2] Parties may indirectly choose the seat when their arbitration agreement does not specify a legal place but adopts institutional rules that include a default provision

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1 Dana Renée Bucy. 'How to Best Protect Party Rights: The Future of Interim Relief in International Commercial Arbitration Under the Amended UNCITRAL Model Law' (2010) *American University International Law Review* 579,583. [Renee Bucy].

2 Peace Omotayo Adeleye, 'The Delimitation of Party Autonomy in National and International arbitration' (2019) 10 The *Gravitas Review of Business & Property Law*,76.

designating the seat. For instance, under Article 16.2 of the London Court of International Arbitration (LCIA) Rules, London (England) is the default seat of arbitration unless parties agree otherwise.

Under Rule 18(2) of the Nairobi Centre for International Arbitration Rules, the default seat is Nairobi, Kenya while Article 14.1 of the Hong Kong International Arbitration Centre (HKIAC) Arbitration Rule provides that failing agreement of the parties, the seat of arbitration shall be Hong Kong.

A seat of arbitration is the juridical home and legal place of arbitration.[3] It is distinguishable from a venue, which is the geographical location where arbitral hearings are conducted.[4]

The selection of a particular seat has significant implications.[5] To begin with, the law of the seat can directly or indirectly govern a number of issues, including (a) the national arbitration legislation applicable to the arbitration, (b) the procedural law governing the arbitration and (c) the law presumptively applicable to the substantive validity of the arbitration agreement.[6] Second, the law of the seat determines the interaction between arbitral tribunals and courts, including arbitrator appointment and removal.[7]

Additionally, the law of the seat nationalises an arbitral award, which means that an arbitral award can only be vacated or set aside by the courts of the seat of arbitration.[8] Third, and most relevant to this paper, the law of the seat empowers courts at the seat with supervisory jurisdiction over arbitral proceedings, including power to order interim measures.[9]

While party autonomy and consent are paramount in international arbitration, the absence of interim measures would make international

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3 Gary Born, *International Commercial Arbitration*, (3rd edn Wolters Kluwer, AH Alphen aan den Rijn 2021) 3208.

4 Ibid.

5 Ibid.

6 Ibid.

7 Jonathan Hill, 'Determining the Seat of an International Arbitration: Party Autonomy and the Interpretation of Arbitration Agreements' (2014) 63 *International and Comparative Law Quarterly* 517, 518.

8 *C v D* [2007] EWCA Civ 1282, para 17.

9 Colman J in *A v B* [2007] 1 Lloyds Rep 237 and *A v B* (No. 2) [2007] 1 Lloyds Rep 358, para 111.

arbitration and the resultant arbitral award futile.[10] An award creditor cannot enjoy the fruits of an arbitral award if the subject matter or assets are no longer existent or have been dissipated by the award debtor.[11] In this regard, interim measures enhance party autonomy, the agreement to arbitrate, and enable parties to get a final and binding determination of their dispute.[12]

By definition, 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 an arbitral award, the arbitral tribunal or the court 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.[13]

Interim measures are broadly divided into two categories: those aimed at avoiding prejudice, loss or damage, and those which are intended to facilitate later enforcement of the award.[14] Regarding the first category, such interim measures aim to avoid or minimize loss or damage of property and subject matter, for example, by preserving a certain state of affairs until a dispute is resolved through rendering of a final award and avoiding prejudice, for instance, through preserving confidentiality, orders of sale of perishable goods, appointment of an administrator to manage income-producing assets, and inspection orders, among others.[15]

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10 Peter Sherwin and Douglas Rennie, Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis (2020) 20 *The American Review of International Arbitration* 317, 317.

11 Ibid 320.

12 Marianne Roth, 'Interim Measures' (2012) *Journal of Dispute Resolution* 425, 426.

13 United Nations General Assembly (UNGA) Res 40/72 (Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law) (11 December 1985). (UNCITRAL Model Law) Article 17(2).

14 UNCITRAL Working Group II, *Settlement of Commercial Disputes*, Preparation of Uniform Provisions on Interim Measures of Protection, Note by the Secretariat, para 16, delivered to the General Assembly, U.N. Doc. A/CN.9/WG.II/WP.119 (30 Jan 2002) [hereinafter Settlement of Commercial Disputes].

15 Ibid para 17. Other orders that can be awarded under this category, include orders that the goods that are the subject matter of the dispute are to remain in a party's possession

The second category deals with enforcement facilitation measures and ensure that actions taken by an adverse party during the arbitration proceedings to avoid enforcement do not render the arbitral tribunal's final award meaningless.[16] These measures include freezing orders, security for the amount in dispute, and security for costs.[17]

As explained by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Betty Construction Ltd*, the purpose of interim measures of protection is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the arbitral award which finally determines the substance of the dispute.[18] Accordingly, interim measures are critical to the efficacy of any arbitration process because they compel parties to conduct themselves in a manner that is conducive to the success of arbitral proceedings thereby preserving the parties' rights, combating self-help, maintaining peace among the parties, and ensuring that the eventual final award can be implemented.[19]

Interim measures can be granted by arbitral tribunals (including emergency arbitrators as permitted by some international arbitration rules) and national courts.[20] Parties often choose international arbitration in order to avoid litigating their dispute before national courts and to centralise the resolution of all disputes in a single neutral forum.[21] This justifies why arbitrators are generally vested with broad powers to order interim reliefs.[22]

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but be preserved, and orders that the respondents hand over property to the claimant on condition that the claimant post security for the value of the property and that the respondent may execute upon the security if the claim proves to be unfounded.

16 Ibid para 18.

17 Ibid.

18 [1993] AC 334,365.

19 Stephen Benz, 'Strengthening Interim Measures In International Arbitration' (2018) 50 *Georgetown Journal of International Law* 143,145.

20 Ibid (n 12) 435. See for instance Article 28(1) of the ICC Rules 2021, Article 25(1) of the LCIA Rules 2020, Rule 27(1) of the NCIA (Arbitration) Rules 2015, and Rule 45(1) of the Singapore International Arbitration Centre (SIAC) Rules 2025. These institutional rules permit arbitral tribunals to grant interim measures.

21 Ibid (n 3) 3989.

22 Ibid.

Further, applying to arbitral tribunals for interim measures preserves confidentiality of sensitive information parties may want to keep private.[23] While that may be the preferred approach, there are instances in which requesting interim measures from national courts is necessary (*hereinafter "court ordered interim measures"*). This can arise where the arbitral tribunal has not yet been constituted.[24] Even when the arbitral tribunal is formed, it may not be able to act effectively.[25] Besides, an arbitral tribunal lacks coercive powers and cannot compel the attendance of witnesses or compel the production of documents.[26] Moreover, an arbitral tribunal is neither empowered to order interim measures against third parties nor to directly enforce the interim measures.[27] Lastly, a party may apply to court where there is a strong possibility that a counterparty will not voluntarily execute the arbitral tribunal's order.[28]

Whereas parties can approach national courts for court-ordered interim measures, complexities arise when an application for interim measures is made in national courts in aid of arbitrations with foreign seats (*hereinafter "foreign-seated arbitrations"*). Courts grapple with the question of which are the proper courts for entertaining and determining the application for interim measures and where the application should be filed. In Kenya, it is unclear whether the High Court has jurisdiction to grant interim measures in foreign-seated arbitrations.

On the one hand, the High Court in the case of *Skoda Export Limited v Tamoil East Africa Limited* held that the High Court lacks jurisdiction to grant interim measures in foreign-seated arbitrations.[29] Conversely, the courts in *CMC Holdings Limited & CMC Motors Group Limited v Jaguar Land Rover Exports*

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23 Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press,2008)105.

24 Sadra Mahabadi, The Need for the Harmonisation of Provisional Measures in International Commercial Arbitration in the European Union (PhD Thesis, University of Manchester 2015)11.

25 Ibid.

26 Ibid.

27 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 424. [Redfern and Hunter].

28 Ibid.

29 [2008]eKLR.

Limited[30], and *Isolux Ingeniera S A v Kenya Electricity Transmission Company Limited & 5 others*[31] held that the High Court has concurrent jurisdiction with the courts at the seat in granting interim measures.

This paper analyses whether Kenyan courts have jurisdiction to grant interim measures in aid of foreign-seated arbitrations. It is divided into six parts. Part I is this introduction on foreign-seated arbitrations and the significance of interim measures in international arbitration. Part II examines the international and domestic legal framework governing court-ordered interim measures in Kenya. In Part III, the paper contextualises and extensively examines the conflicting decisions among Kenyan courts in granting interim measures in aid of foreign-seated arbitrations. Part IV discusses the jurisdiction of English courts in granting interim measures in support of foreign-seated arbitrations. It highlights the factors considered by English courts before assuming jurisdiction to grant interim measures in foreign-seated arbitrations. In Part V, the paper proposes factors that should be considered by Kenyan courts in granting interim measures in support of foreign-seated arbitrations. Part VI concludes the paper.

2.0 LEGAL FRAMEWORK GOVERNING THE JURISDICTION OF KENYAN COURTS IN GRANTING INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

2.1 THE UNITED NATIONS COMMISSION ON TRADE LAW (UNCITRAL) MODEL LAW AND COURT ORDERED INTERIM MEASURES

The Model Law was adopted by the UNCITRAL on 21 June 1985 and was developed to address disparities in national laws on arbitration.[32] It seeks to create uniformity of the law of arbitral procedures and address the specific needs of international commercial arbitration practice.[33]

30 [2013]eKLR.
31 [2018]eKLR.
32 UNCITRAL, *Digest of Case Law on the Model Law on International Commercial Arbitration*,2012,1. [UNCITRAL Digest].
33 UNCITRAL Model Law.

Kenya adopted the UNCITRAL Model Law and incorporated it into its 1995 Arbitration Act, as amended in 2009 (the "*Kenyan Arbitration Act*").[34] The Kenyan Arbitration Act contains numerous provisions that are *pari materia* with those of the UNCITRAL Model Law.[35] While commenting on the influence of the UNCITRAL Model Law on the Kenyan Arbitration Act, the Supreme Court in *Synergy Industrial Credit Limited v Cape Holdings Limited* observed that Kenya, by adopting the Model Law, incorporated international arbitration principles into its legal system, including expedition, party autonomy, procedural flexibility, finality, and the enhanced recognition and enforceability of arbitral awards, along with other best practices.[36] The apex court emphasized that the interpretation of the Kenyan Arbitration Act must always align with these objectives.[37]

Article 9 of the UNCITRAL Model Law provides that 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.[38] This provision, which is addressed to state courts, emphasises the compatibility of an arbitration agreement and any interim measures that may be granted by any court, regardless of the seat of the arbitration.[39] Thus, under the UNCITRAL Model Law, a request for interim measures filed to a court in any state may not be interpreted as a waiver of or an objection to the existence or enforceability of the arbitration agreement.[40]

While Article 9 of the UNCITRAL Model Law has been incorrectly interpreted as a justification for national courts to assume jurisdiction to grant interim measures, it only addresses the effect of an arbitration agreement by stating that it is not incompatible with such an agreement for a party to request or a court to grant an interim measure of protection.[41] It does not confer on courts

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34 Francis Kariuki and Vianney Sebayiga, 'Arbitrability of Fraud in Kenya' (2022) 2 *Nairobi Centre of International Arbitration (NCIA) ADR Journal* 11,13.
35 Ibid.
36 [2019] KESC 12 (KLR).
37 Ibid.
38 UNCITRAL Model Law, Art 9.
39 UNCITRAL Digest (n 32) 52.
40 Ibid.
41 Ibid.

the powers to issue interim measures of protection in support of international arbitration.[42] This interpretation is evident in the working papers of the UNCITRAL Model Law Working Group.

In its report on the work of its eighteenth session, the Working Group observed that Article 9 merely expressed the principle that a request for any court measure available under a given legal system and the granting of such measure by that court was compatible with the fact that the parties had agreed to settle their disputes by arbitration.[43] It does not regulate whether and to what extent court measures were available under a given legal system. Instead, it merely expressed the principle that any request for, and the granting of, such interim measure, if available in a legal system, was not incompatible with the fact that the parties had agreed to settle their dispute through arbitration.[44]

The underlying justification for Article 9 of the UNCITRAL Model Law is that interim measures are sometimes required from courts to ensure the arbitral tribunal's ability to dispose of the merits of the case fully and effectively.[45] This is because arbitral tribunals are sometimes unable to adequately respond effectively to a party's request for interim measures of protection.[46] Examples include cases where an interim measure is needed prior to the constitution of the arbitral tribunal, or where an interim measure needs to be ordered against a third party over which the arbitral tribunal has no authority.[47]

Notably, unlike the UNCITRAL Model Law, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Convention has no

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42 Ibid. See also the Singaporean Court of Appeal in *Swift-Fortune Ltd v Magnifica Marine SA* [2006] SGCA 42 where the court observed that Article 9 of the UNCITRAL Model Law was not intended to confer jurisdiction but to declare the compatibility between resolving a dispute through arbitration and at the same time seeking assistance from the court for interim protection orders.

43 *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session' UN Doc A/40/17*, (3 June to 21 June 1985) para 96, reprinted in [1985] Yearbook of UNCITRAL, vol XVI.

44 Ibid para 169.

45 UNCITRAL Digest (n 32) 53.

46 Ibid.

47 Ibid.

express provisions regarding conservatory, provisional, or interim measures granted by an arbitral tribunal or a court in support of arbitration.[48] As a result, their availability and procedure depend on the law of the court before which the measure is sought.[49]

2.2 THE KENYAN ARBITRATION ACT AND COURT ORDERED INTERIM MEASURES

Similar to the UNCITRAL Model Law, the Kenyan Arbitration Act provides that it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.[50] The statute gives the High Court wide powers to grant interim orders to maintain the *status quo* of the subject matter pending the determination of the dispute through arbitration.[51] Where a party applies to the High Court for an interim measure and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court is required to treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.[52]

The Court of Appeal in the case of *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* laid down the factors which courts must consider before issuing interim measures of protection.[53] These are (i) the existence of an arbitration agreement; (ii) whether the subject matter of arbitration is under threat; (iii) in the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application; and (iv) for what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's

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48 Albert Jan van den Berg, 'The New York Convention of 1958: An Overview' <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf> [Accessed on 6 July 2024],12.

49 Ibid (n 3) 3974.

50 The Arbitration Act (CAP 49) Article 7(1).

51 Muigua Kariuki , *Settling Disputes Through Arbitration in Kenya*, (Glenwood Publishers Limited, Nairobi 2017) 172.

52 Arbitration Act, Article 7(2).

53 [2010] eKLR.

decision making power as intended by the parties?[54] In addition to the above factors, the court in *Futureway Limited v National Oil Corporation of Kenya* added that (i) the grant of an interim measure of protection is discretionary; (ii) the court should consider the urgency with which the applicant has moved to court; and (iii) whether there is the risk of substantial (not necessarily irreparable) harm or prejudice in the absence of protection.[55]

A party seeking interim measures is required to approach the High Court as provided under the Kenyan Arbitration Rules by filing an application through summons in the suit.[56] This means that the application must be anchored on plaint. The Court of Appeal has held that the failure to adhere to the above mandatory procedure makes the application fatally and incurably defective.[57]

3.0 KENYAN COURTS AND INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

In this section, the paper contextualises the inconsistency among Kenyan courts by examining the cases where they have grappled with whether the High Court has jurisdiction to grant interim measures in support of foreign-seated arbitration.

3.1 SKODA EXPORT LIMITED V TAMOIL EAST AFRICA LIMITED [2008] EKLR (THE SKODA CASE)

3.1.1 FACTS AND BACKGROUND

The dispute was between Skoda Export Limited (Skoda), the Plaintiff, a company wholly owned by the Government of the Czech Republic, and Tamoil East Africa Limited ("Tamoil"), the Defendant, a limited liability company incorporated in the Republic of Uganda but having its place of business in Kenya.[58] In 2005, the Government of Kenya and Uganda through their joint co-ordinating committee (JCM) invited bidders to submit proposals for the development of the Kenya-Uganda oil product pipeline extension (the

54 Ibid.
55 [2017] eKLR para 35.
56 Rule 2 of the Kenyan Arbitration Rules 1997.
57 *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR
58 *Skoda Export Limited v Tamoil East Africa Limited* [2008] eKLR,1. [Skoda Case]

"Project") through a request for proposals (RFP).[59] The JCM had pre-qualified 12 firms including the Plaintiff and was invited by Tamoil to partner with it and a contract consultant, *Penspen Limited,* to form a consortium and submit a proposal to the RFP for the Project.[60]

The incentive for Skoda's partnership with Tamoil was based on a binding memorandum of understanding dated 29 October 2005, wherein Tamoil acknowledged that Skoda would be the engineering procurement and construction (EPC) contractor for the project in the event that the Defendant, which was the lead firm in the consortium won the tender.[61] By a letter dated 21 July 2006, JCM informed the Defendant that the proposal by Tamoil Group/Skoda Export and Penspen was most advantageous and invited the consortium to negotiations on the contract after the award of the tender.[62]

The parties among others had signed a comprehensive and substantive agreements between themselves in case a dispute arose concerning their relationship and, in the management, and operation of the project.[63] One of the agreements included an arbitration agreement dated 22 March 2007. Clauses 12 and 13 provided as follows:

Clause 12

> *"All and any dispute arising from and in relation to this contract that cannot be resolved by amicable agreement between the parties: (a)* ***shall finally be settled under the Rules of arbitration of the International Chamber of Commerce (ICC) Paris****; (b) the dispute shall be settled by one or more arbitrators appointed in accordance with these Rules;(c) the arbitration shall be conducted in the English language; and (d)* ***the place of arbitration shall be London, England****".*[64] *(emphasis added).*

Clause 13

> *"All relations between the parties under this contract and the legal consequences thereof, including the validity of this contract and the consequences of invalidity of this contract are* ***governed by and***

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59 Ibid.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid 2.
64 Ibid 6.

construed in accordance with Laws of England and Wales".[65] *(emphasis added).*

The Plaintiff contended that pursuant to the arbitration agreement above, it had declared a dispute between the parties as a result of the Defendant's actions and had given notice to the Defendant, of its intention to commence arbitration proceedings.[66] In its application dated 13 December 2007, Skoda sought among other prayers (1) an injunction restraining the Defendant from inviting and or receiving any bids for the tender for the award of the EPC contract, pending the hearing and determination of the application and the reference to arbitration; and (2) pending the hearing and determination of the application and the reference to arbitration, the Defendant be restrained from breaching the agreements between the parties, and entering into an EPC contract with any other party other than the Plaintiff for the project.[67]

At the *interparties* hearing, the Defendant filed and served a Notice of Preliminary Objection stating that the court had no jurisdiction to entertain and determine either the suit or the application on grounds that (1) the Kenyan Arbitration Act had no application to the contract dated 22 March 2007; (2) The contract alleged to have been breached was made in Prague in the Czech Republic; (3) The Plaintiff was a Czech company while the Defendant was a Ugandan company; (4) The proper law of the contract was the Law of England and Wales and that the seat of the proposed arbitration was London, England; and (5) The curial law of the proposed arbitration proceedings was English law.[68]

3.1.2 ARGUMENTS BY THE PARTIES

The Defendant argued that the contract had no connection with Kenya and that since the parties had chosen the laws of England and Wales to apply to the contract, they had excluded the application of the Kenyan Arbitration Act.[69] Further, the Defendant cautioned that should the court assume

65 Ibid.
66 Ibid 2.
67 Ibid.
68 Ibid 3.
69 Ibid.

jurisdiction, entertain the application, and grant the prayers in the application, how was it going to supervise the proceedings, which would be conducted outside its jurisdiction.[70]

In response, the Plaintiff argued that since the parties were dealing with a contract for carrying out works in Kenya and Uganda, the performance of the contract was to take place in Kenya.[71] As a result, the subject matter of the dispute was being performed in Kenya.[72]

In addition, the Plaintiff submitted that the court has supervisory jurisdiction to supervise the acts and conducts of the parties as it pertains to any contractual dispute.[73] In further support of its submission, the Plaintiff contended that it was permitted by Article 23(2) of the ICC Rules to apply before a municipal court to obtain an interim measure of protection pending arbitration.[74] In its view, the laws applicable to arbitration agreements do not take away the jurisdiction of the High Court to grant interim measures and that if the parties had intended to take away the powers of the court then, they would have expressly provided in the contract.[75]

In summation, the Plaintiff submitted that the provisions of Section 7 of the Kenyan Arbitration Act empower the court to issue interim measures and that it did not matter whether the Plaintiff and or Defendant had a place of business in Kenya since they also do not have a place of business in United Kingdom, the seat of arbitration.[76]

3.1.3 DETERMINATION BY THE COURT

The key issue for determination was whether the court had jurisdiction to entertain the suit.[77] In addressing the issue, the court began by noting that

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70 Ibid 4.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid 4.
76 Ibid.
77 ibid.

the parties had selected London as the seat of arbitration and that both parties were foreign owned and registered companies.[78]

According to the court *(Warsame J as he then was*), while the contract was being performed in Kenya, the performance of the contract and the place where the contract was to be completed cannot accord the court jurisdiction, which was mutually and consensually ousted by the parties.[79] In its view, a Kenyan court was not a competent judicial authority under Article 23 of the ICC Rules which allows parties to apply to any competent judicial authority for interim or conservatory measures. In the court's view, a court does not become a competent judicial authority by virtue of a party coming before it with a dispute which requires a judicial intervention.

On the contrary, the intervention of the court can only arise when there is judicial mandate to do so, which mandate in arbitration matters, is either given by statute or by consent of the parties, or where it is in the general interest of justice to intervene to give an interim measure of protection.[80] This was also based on the parties' choice that the agreement be construed and governed in accordance with the Laws of England and Wales, thereby excluding the application of any other laws including the laws of Kenya to the dispute.[81]

Therefore, according to the court, Kenyan courts can neither be moved under local laws for any relief pursuant to the agreement between the parties nor be called upon to adjudicate in support of a cause of action, which parties had agreed should be the subject of a foreign arbitration and exclusive jurisdiction of English courts.[82]

The court also observed that it cannot assert personal jurisdiction over parties who are foreigners and who have chosen foreign-seated arbitrations.[83] As

78 ibid 6.
79 ibid 7.
80 ibid.
81 ibid 8.
82 ibid.
83 ibid.

such, a Kenyan court has no territorial jurisdiction to enforce interim measures.[84]

In addition, while interpreting Section 2 of the Kenyan Arbitration Act[85], the court stated that this provision cannot be interpreted to mean that the Arbitration Act applies to all or any arbitration whether domestic or international.[86] According to the court, the exclusion given in Section 2 of the Arbitration Act supports the intention of the parties to have their disputes determined in Kenya whether the arbitration contract is entered in Kenya or outside. [87] The option and/or election to choose the relevant jurisdiction and the relevant applicable laws is reserved for the parties.[88]

The court was unconvinced that Parliament intended that the power to grant an interim relief by a Kenyan court should be exercised in respect of foreign-seated arbitrations for two reasons.[89] First, the chosen mechanism was to make those provisions into implied terms of the arbitration agreement and such terms could not be sensibly be incorporated into an agreement governed by a foreign arbitration law.[90] Second, the court could not see any justification as to why Parliament should have had the least concern to regulate the conduct of an arbitration process carried on abroad pursuant to a foreign arbitral law.[91] Lastly, the court underscored that despite the parties knowing that a substantial part of the main agreement was to be performed in Kenya and Uganda, they opted to limit and restrict the jurisdiction of courts in the two states. Therefore, the parties must confine themselves to their bargain.[92]

In conclusion, the High Court allowed the preliminary objection holding that the High Court lacks jurisdiction to grant the interim measures sought as the

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84 ibid.
85 '*except as otherwise provided in particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration'*.
86 Skoda Case (n 58) 8.
87 ibid.
88 ibid 9.
89 ibid.
90 ibid.
91 ibid.
92 ibid.

seat of arbitration was London and the English courts had exclusive jurisdiction to grant interim measures.[93]

3.2 CMC HOLDINGS LIMITED & CMC MOTORS GROUP LIMITED V JAGUAR LAND ROVER EXPORTS LIMITED [2013] EKLR (THE CMC CASE)

3.2.1 FACTS AND BACKGROUND

By a Distributorship Agreement dated 12 December 1985, Land Rover Exports Limited ("Respondent") and CMC Motors Group Limited (previously known as Cooper Motor Corporation (Kenya) Limited) ("Applicant"), the latter was given the exclusive franchise to distribute, sell and service the Respondent's various brands of motor vehicles of the Land Rover brand outside the United Kingdom.[94] The agreement contained a dispute resolution clause below:

"*a. This Agreement shall be governed by and construed in all respects in accordance with the* ***Law of England****.*

b. The ***English courts (to whose jurisdiction the Company and the Distributor hereby submit)*** *shall be competent to entertain and adjudicate upon any matter arising out of or in connection with this Agreement.*

*c. In the event that any dispute or difference arises between the parties which cannot be settled by the amicably then the Company shall such dispute or reference be referred to arbitration…****Any such arbitration shall be conducted under the Rules of Conciliation and Arbitration of the United Nations Commission in International Trade Law and shall be held in London****.*

iv. Nothing in this clause shall prevent the Company from applying to ***the appropriate court in the Territory (Kenya) for any injunction or other like remedy to restrain the Distributor*** *from committing or continuing to*

93 ibid.

94 *CMC Holdings Limited & CMC Motors Group Limited v Jaguar Land Rover Exports Limited [2013] eKLR.* [CMC Holdings Court of Appeal].

commit any breach of this Agreement and for consequential relief". (*emphasis added*)

Another important clause was 2(A), which provided for the *'no fault termination clause'* of the agreement by either party who may wish to bring to an end the said business relationship which was otherwise open ended.[95] The said clause provided that the agreement may be *'terminated by either party giving the other six months prior notice to that effect expiring on any date.'*[96]

On 1 February 2009, a second non-exclusive Importer Agreement was entered into between Jaguar Cars Exports Limited and CMC Motors Group Limited concerning Jaguar vehicles, Jaguar parts and Jaguar accessories. The agreement was for a fixed term of three (3) years ending on 30 January, 2012.[97] Clause 26 in the Importer Agreement provided as follows: '***This Agreement shall be governed by and construed in accordance with English law***. *The parties irrevocably submit to the* ***exclusive jurisdiction of the English courts***. *All disputes or claims arising out, emanating from, or in connection with this Agreement including any question regarding its existence, validity or termination, or the legal relationship established by this Agreement shall be referred to and* ***finally resolved by arbitration under the Rules of London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.*** *The language of arbitration proceedings shall be English, and the arbitration shall take place in London'*.[98] (*emphasis added*).

Under the Importer Agreement, any party that wanted to terminate the agreement was required to give the other six (6) months' written notice and under clause 20.5, such a party would not be required to provide reasons for its decision to terminate the said agreement.[99] Even though the second agreement was supposed to lapse on 31 January 2012, the parties continued their working relationship even after that date; however, by a letter dated 3

95 ibid.
96 ibid.
97 ibid.
98 ibid.
99 ibid.

August 2012, the Respondent invoked clause 20.1 of the Importer Agreement and gave the Applicants six (6) months' notice of termination of the agreement.[100] The agreement was therefore, expected to terminate on 2 February 2013.[101] In another letter dated 3 August 2012, the Respondent wrote to the Applicants citing clause 2A of the Distributorship Agreement and gave six (6) months' termination notice.[102] According to that notice which invoked the no fault termination clause, the agreement was similarly supposed to stand terminated on 2 February, 2013.[103]

The Applicants contested the validity of the above termination notices prompting them to file an application before the High Court (Kamau J) seeking an interim injunction restraining the Respondent from interfering with the exclusive Distributorship Agreement between the Applicants and the Respondent.[104]

On 4 January 2012, the Respondent filed a Notice of Preliminary Objection contesting the jurisdiction of the High Court stating that (i) the Kenyan Arbitration Act had no relevance or application to the contract between the parties; (ii) the contractual obligations between the parties excluded the Applicant from challenging the termination of the contract on the basis of appointment of a successor distributor, or the supply of any products following the service of a rumination notice; (iii) the contractual agreement between the parties provided that the disputes between them were to be resolved by arbitration under English law and not Kenyan law and reserved exclusive jurisdiction to English courts; and (iv) the Respondent was a foreign entity operating outside the jurisdiction of this court and the contracts underlying the suit and application were made outside the jurisdiction of this court.[105]

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100 ibid
101 ibid.
102 ibid.
103 ibid.
104 *CMC Holdings Limited & Another v Jaguar Land Rover Exports Limited* [2013] eKLR [CMC Holdings High Court].
105 ibid para 4.

3.2.2 ARGUMENTS BY THE PARTIES

The Applicants argued that the Constitution conferred on the High Court of Kenya unlimited original jurisdiction to determine civil and criminal disputes and that every person has a right to access justice and to fair hearing under Articles 48 and 50 respectively of the Constitution.[106] In its response to the application, the Respondent argued that the Kenyan court lacked jurisdiction to determine the matter as jurisdiction was exclusively reserved for the English courts under the Distributorship Agreement.[107] The Respondent therefore argued that the court cannot re-write the contract between the parties which specifically provided for English law as the choice of law and the exclusive jurisdiction of the English courts.[108]

3.2.3 DETERMINATION OF THE COURT

There were two issues before the court; namely, whether the High Court was clothed with jurisdiction to determine the matter and whether the court can grant an interim injunction in favour of the Applicants pending reference to arbitration.[109]

i) *whether the High Court was clothed with jurisdiction to determine the matter*

In addressing the issue, the court began by agreeing with the submission of the Applicants that the High Court has unlimited original jurisdiction to determine civil and criminal disputes and that every person has the right to access justice.[110] The court then interpreted Section 2 of the Kenyan Arbitration Act and according to it, the Kenyan Arbitration Act confers jurisdiction on the High Court to hear matters arising out of domestic and international arbitrations.[111] Therefore, the court disagreed with the

106 ibid para 47.
107 ibid para 46.
108 ibid para 40.
109 ibid paras 32 and 60.
110 ibid.
111 ibid para 50.

Respondents' contention that the Kenyan Arbitration Act was enacted with the sole purpose of dealing with domestic arbitration.[112]

While interpreting the arbitration clause in the Distributorship Agreement, the court observed that it permitted the Respondent to seek injunctive orders in Kenya in which proceedings the Applicants would be parties to.[113] In the court's view, the arbitration clause did not exclude the jurisdiction of the court to adjudicate over matters that it had jurisdiction over.[114] Therefore, on this issue, the court held that no contract can oust the jurisdiction of a Kenyan court and that it would be a great miscarriage and travesty of justice if the Applicants were shut out from Kenyan courts due to wording in their contracts.[115] The court, while commenting on the Importer Agreement, observed that the circumstances would be different as it exclusively limited the jurisdiction of the disputes between the parties to English courts.[116] That notwithstanding, the court maintained that it would still have jurisdiction as conferred by the Constitution and the Kenyan Arbitration Act.[117]

ii) whether the court can grant an interim injunction in favour of the Applicants pending reference to arbitration

The court began by observing that before granting interim measures, the court must be satisfied that that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection.[118] After careful analysis of the circumstances, the court declined to grant the interim measures as prayed finding that a contract was not something that would be wasted if it was not conserved.[119] In addition, the Applicants intended to act on the contracts until the determination of the reference and as such, they would not remain static or in the same state they were in.[120] That being the case, the court held that

112 ibid.
113 ibid para 53.
114 ibid.
115 ibid para 54.
116 ibid para 55.
117 ibid.
118 ibid para 62.
119 ibid para 63.
120 ibid.

granting the orders being sought by the Applicants would not only amount to preventing the Respondent from exercising its rights under the contract, but would also amount to interfering in issues that would rightly be before the arbitral tribunal or English courts and for which the court would not have jurisdiction to deal with.[121] In the court's view, the issue of whether the Respondent was entitled to terminate the contracts cannot form part or the basis of an interim measure of protection.[122] Ultimately, the court dismissed the application for interim measures by the Applicants for lack of merit.[123]

3.3 ISOLUX INGENIERA S A V KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED (KETRACO) & 5 OTHERS [2018] EKLR (THE ISOLUX CASE)

3.3.1 FACTS AND BACKGROUND

Isolux Ingeniera S A, the Plaintiff was a Spanish company headquartered in Madrid, Spain and was a subsidiary of Grupo Isolux Corsan S A ("parent company") while KETRACO, the 1st Defendant, is a Kenyan corporate entity, wholly owned and controlled by the Government of Kenya.[124] On 20 December 2011, the parties entered into an EPC contract for the electricity transmission lines between Loyangalani and Suswa electricity substations, and the works included EPC, testing, and commissioning of approximately 428 km of a 400KV transmission-line connecting the national power grid to a wind power project located in the north-western part of Kenya, which was to be developed by Lake Turkana Wind Power Limited.[125] Some of the key clauses in the EPC contract included, provisions on contract price, part of which was to be paid in advance by KETRACO upon receipt of an invoice from Isolux, as well as receipt of a performance security in the amount of 10% of the contract price and an advance payment guarantee from a bank approved by KETRACO.[126]

The contract also provided for termination by either party on grounds of failure to pay the undisputed amount in time to non-compliance with various

121 ibid.
122 ibid.
123 ibid.
124 [2017] para 14.
125 ibid para 15.
126 ibid para 16.

contractual conditions and obligations or where either party was unable to, pay its debts or became insolvent (including the parent company) or KETRACO.[127] In addition, both parties represented and warranted to each other that neither party was in liquidation or subject to an administration order and no administrator, administrative receiver or receiver had been appointed over the whole or a substantial part of either Isolux's or KETRACO's property assets or undertaking.[128]

The contract provided that any dispute or difference arising out of or in connection with the contract was to be referred to and settled by arbitration under the ICC Rules of Conciliation and Arbitration by three arbitrators.[129] The seat of arbitration was agreed upon as London, England and that the contract was governed by and construed in accordance with the Laws of Kenya.[130]

Pursuant to the contract, Isolux Limited caused to be issued to KETRACO performance guarantees by the Bank of Africa and Commercial Bank of Africa Ltd on diverse dates.[131] On 20 July, 2017, Isolux wrote to KETRACO and informed it of the commencement of insolvency proceedings of the parent company as well as several of its subsidiaries including Isolux.[132] In its response dated 14 August 2017, KETRACO invoked the provisions of clause 15.2 (h) of the EPC contract and terminated the contract with immediate effect on grounds that the filing of the insolvency petition by the parent company was an event of breach of the terms of the said EPC contract.[133]

Therefore, it requested Isolux to urgently arrange for proper hand-over of the site and works and deliver any required goods, all contractor's documents and other design documents to ensure the protection of property and or for the safety of the works as provided in the EPC contract.[134] However, Isolux neither

127 ibid para 17. Clauses 15.2 and 16.2 of the EPC contract.
128 ibid para 18. Clause 24.2 of the EPC contract.
129 ibid para 20.
130 ibid.
131 ibid para 23.
132 ibid para 24.
133 ibid.
134 ibid.

arranged for a proper hand-over of the site and works to KETRACO nor delivered any required goods and contractors documents or any documents to KETRACO as demanded.[135] Instead, by its letter of 16 August 2017, Isolux denied being in breach of the terms of the contract and reiterated its commitment to the contract.[136]

In its application before the High Court dated 24 August 2017, Isolux sought interim measures of protection pending arbitration namely; (i) that the court grants an interim measure of protection restraining the Defendant from assigning the contract to any other contractor or third parties; (ii) that the court grants an interim measure of protection restraining the Defendant from enforcing the calling of the bank guarantees in respect of the contract; and (ii) that an injunction be issued pending the reference to arbitration and the hearing of the arbitral proceedings restraining the Defendant from dealing with, releasing or taking possession of the Plaintiff's material on site and the drawing works in respect of the contract.[137]

In opposition, KETRACO contested Isolux's application on various grounds including grounds stated in the Notice of Preliminary Objection dated 22 August 2017 that the court lacked jurisdiction to entertain the applications for interim measures. In KETRACO's view, given the absence of any move to constitute an arbitral tribunal, the court lacked jurisdiction to entertain the applications by Isolux.[138] In addition it contended that since the parties had selected London as the seat of arbitration, the national courts of Kenya lacked the powers to grant the orders sought.[139]

3.3.2 DETERMINATION OF THE COURT

The main issue before the court was whether the court had jurisdiction to entertain the suit/applications.[140] The court began by acknowledging that the juridical seat of arbitration under the arbitration agreement between the

135 ibid para 25.
136 ibid.
137 ibid para 9.
138 ibid para 46.
139 ibid.
140 ibid para 45.

parties was London.[141] The court then asked itself what national court was competent to grant interim measures of protection in an arbitration where the underlying contract is performed in Kenya.[142] In dealing with this question, the court found that, in the absence of any agreement by the parties to the contrary, there was no justification as to why the national courts of Kenya should not in full recognition of the doctrine of comity support arbitration scheduled to take place in London, England, especially where the law of the seat of arbitration and the rules of the relevant arbitral institution do not prohibit the national courts of any other country from granting the interim measures of protection.[143]

In addition, the court grounded its reasoning in Section 2 of the Kenyan Arbitration Act which stipulates that the statute applies to both domestic and international arbitration unless expressly provided otherwise.[144] Therefore, the court's wide powers to grant interim measures under Section 7 (1) of the Kenyan Arbitration Act are not limited to domestic arbitration and arbitrations in Kenya only.[145] On the contrary and in the court's view, Section 7 of the Arbitration Act extends to international arbitration.[146]

In concluding on the issue of jurisdiction, the court rightly held that there exists concurrent jurisdiction whereby either the arbitral tribunal once constituted or the national courts of the juridical seat of arbitration or the national courts of where the underlying contract was being performed, may as appropriate and depending on the urgency, entertain and grant an interim measure of protection pending arbitration.[147]

Ultimately, the court held that in the absence of any law of the seat of arbitration or rules of an international arbitration institution prohibiting Kenyan courts from exercising such jurisdiction, and in the absence of any agreement to the contrary by the parties, the High Court has both the

141 ibid para 51.
142 ibid.
143 ibid para 53.
144 ibid para 54.
145 ibid.
146 ibid.
147 ibid para 55.

substantive and territorial jurisdiction to deal with and determine the applications for interim measures of protection.[148]

3.4 OBSERVATION AND COMMENTS ON KENYAN JURISPRUDENCE ON THE JURISDICTION OF KENYAN COURTS TO GRANT INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

The narrow interpretation of Section 2 of the Kenyan Arbitration in the Skoda Case limiting the application of the statute to domestic arbitrations contradicts the express legislative intent by limiting the statute's application to domestic arbitrations, even though it is meant to apply to both domestic and international arbitrations. Unlike the Skoda Case, the courts in the CMC and Isolux Cases, properly interpreted the provision to apply to both domestic and international arbitration. As a result, a Kenyan court can grant interim measures under Section 7 of the Kenyan Arbitration Act in aid of foreign-seated arbitration. While this may be the case, the court in the Isolux Case rightly and persuasively cautioned that the exercise of such jurisdiction is dependent on the absence of any law of the seat of arbitration or rules of an international arbitral institution prohibiting Kenyan courts from exercising such jurisdiction, and in the absence of any agreement to the contrary by the parties.

Notably, the court in the Skoda Case appeared to have ignored a binding Court of Appeal decision in the case of *Tononoka Steels Limited v The Eastern and Southern African Trade and Development Bank* (the "Tononoka Case") in which Lakha JA rejected the submission that by providing in the agreements that parties would be governed and construed in accordance with the Laws of England, and that any dispute or difference between the parties shall be finally settled by the ICC Arbitration Rules in London, amounted to a complete ouster or exclusion of the jurisdiction of Kenya courts.[149]

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148 ibid para 56.

149 [2000] 2 EA 536 (CAK) 549. This position has been followed by the High Court in *Indigo EPZ Limited v Eastern and Southern African Trade & Development Bank* [2002] eKLR where the court held that there was nothing in the arbitration clause that ousted the jurisdiction of the court and excluded the application by any party of interim measures under Section 7 of the Arbitration Act.

According to the learned judge, while the jurisdiction to deal with substantive disputes and differences is given to the ICC in London, the Kenyan courts retain residual jurisdiction to deal with peripheral matters and ensure that any disputes or differences are dealt with in the manner agreed between the parties under the agreements.[150] Notably, the arbitration clause in the Skoda Case was similar to the Tononoka Case in that London was the seat of arbitration and the ICC Rules were the selected arbitration rules.

Furthermore, beyond the fact that the parties in the Skoda Case were foreign registered companies, it appears that the court also predicated its decision to decline jurisdiction on the fact that since Skoda was owned wholly by the Government of Czech Republic, a foreign government which could not be the subject of proceedings before Kenyan courts.[151]

While the court in the CMC case is commended for exercising restraint and potentially usurping the powers of the arbitral tribunal in dealing with the issue of whether the termination of the agreements was valid, its reliance on the constitutional provisions to justify the assumption of jurisdiction to grant interim measures in a foreign-seated arbitration is contestable. This is because invoking constitutional arguments and articles in purely commercial matters between private parties undermines party autonomy and freedom of parties.[152]

Moreover, any dispute between parties can be framed as a constitutional dispute and traceable to the rights guaranteed under the Constitution. Therefore, it appears that if parties expressly excluded the jurisdiction of Kenyan courts in granting interim measures in a foreign-seated arbitration or restricted the application of interim measures to the court at the seat, the implication of the CMC Case is that the court can assume jurisdiction contrary to the parties agreement, an erroneous approach that contradicts party autonomy, the cornerstone of arbitration.

150 ibid.
151 Skoda (n 58) 9.
152 *Kenya Breweries Limited & another v Bia Tosha Limited & 5 others* [2020] eKLR.

4.0 CASE STUDY ON THE JURISDICTION OF ENGLISH COURTS IN GRANTING INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

4.1 POWER OF ENGLISH COURTS TO GRANT INTERIM MEASURES

Section 44 of the English Arbitration Act is the central provision that delimits the power of English courts to grant interim orders in support of arbitration agreements.[153] These measures include taking evidence from witnesses; preserving evidence; granting orders for the inspection, photographing, and preservation of property; and ordering interim injunctions or the appointment of a receiver.[154] The exercise of the court's powers under Section 44 of the English Arbitration Act applies even where the seat of the arbitration is outside England and Wales or Northern Ireland or where no seat has been designated or determined.[155] That notwithstanding, the court may refuse to exercise the powers to grant interim measures if it is inappropriate in such case.[156] The above provisions empower English courts to grant interim measures in support of foreign-seated arbitrations.[157]

While courts can grant interim measures, parties can expressly contract out of Section 44 in their arbitration agreement as it is a non-mandatory provision.[158] This issue arose in the case of *B v S* where the parties had a *Scott v Avery* clause barring the parties from bringing any court proceedings until a dispute was finally resolved by the arbitrator and that the arbitral award was a condition precedent to any legal proceedings.[159] The court found that by dint of the *Scott v Avery clause*, the parties had agreed to exclude the

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153 The Arbitration Act, Chapter 23, 1996, Section 44. [the English Arbitration Act].

154 ibid Section 44(2) (a-e).

155 ibid Section 2(3)(b). Jonathan Schaffer-Goddard, 'Court Orders for Oral Evidence and Disclosure by Non-Parties in Support of Foreign Arbitration Proceedings: The Changing Picture in England' (2022) *New York university International Law and Politics* 1113,1117.

156 ibid.

157 Martin Davies, 'Court-Ordered Interim Measures in Aid of International Commercial Arbitration' (2008) 17 *The American Review of International Arbitration*,9.

158 English Arbitration Act (n 153) Section 4(1) and (2) and Schedule 1. See also Sadra Mahabadi, 'The Need for the Harmonisation of Provisional Measures in International Commercial Arbitration in the European Union' (PhD thesis, University of Manchester 2015) 114.

159 [2011] EWHC 691 (Comm).

court's powers under Section 44, and therefore the court could not entertain the application for a freezing injunction in favour of arbitration.[160]

Notably, the court is only entitled to exercise its powers under Section 44 of the English Arbitration Act to the extent that the arbitral tribunal or institution has no power, or is unable for the time being, to act effectively.[161] Before the court can exercise its powers to grant interim measures, there are some requirements that must be met, such as urgency. In urgent cases, a party or proposed party to arbitral proceedings, can apply to the court for an order for the purpose of preserving evidence or assets.[162] Conversely, in non-urgent cases, the court can only act on an application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) with the tribunal's permission or other parties' written agreement.[163]

For urgent cases, the English High Court in *Travelers Insurance Company Ltd v Countrywide Surveyors Ltd* observed that the exercise of the court's powers in urgent cases can only be invoked in exceptional circumstances where, for instance, critical evidence is about to be lost forever or where there is a risk that it will be destroyed or otherwise be tampered with, thereby making it of no probative value.[164] In the court's view, such power should not be used where, once arbitration proceedings start, the arbitrator can make precisely the same order as the court could under Section 44(2) of the English Arbitration Act.[165] Since there was no express evidence as to a particular risk of lost documents, or an imminent threat to the preservation of the evidence or the assets, the court held that there was no urgency, and therefore lacked power to make orders under Section 44(3) of the English Arbitration Act.[166]

Similarly, in *JOL and JWL v JPM* [2023] EWHC 2486, the English High Court dismissed an application for urgent interim injunctions as the requirement of

160 ibid para 88.
161 English Arbitration Act, Section 44(5).
162 ibid Section 44(3).
163 ibid Section 44(4).
164 [2010] EWHC 2455 (TCC), para 27.
165 ibid.
166 ibid para 28. See also *Mobil Cerro Negro Limited v PDVSA* [2008] 1CLC 542.

urgency had not been met.[167] The claimant had sought injunctions requiring the respondents to re-deliver two vessels or at least to take all and any steps to do so.[168] The court was not convinced that the mere fact that it will take longer to obtain any relief from the arbitral tribunal than seeking interim reliefs from the court was itself sufficient to establish urgency.[169] Further, there was no significant risk of physical deterioration or damage to the vessels as the arbitral tribunal could deliver the arbitral award between six and eight weeks.[170] To conclude on urgency, if the case is one of urgency, the court only has jurisdiction to make such orders as it thinks necessary for the purpose of preserving evidence or assets.[171] Assets are broadly interpreted to mean both tangible and intangible assets, including choses in action and contractual rights.[172]

4.2 THE POWER OF ENGLISH COURTS IN GRANTING INTERIM MEASURES IN SUPPORT OF FOREIGN PROCEEDINGS

As earlier highlighted, where the seat is outside England and Wales, the power to grant interim measures must only be exercised if it is appropriate to do so.[173] The power may also be exercised where the arbitration has no connection with England and Wales but there is a need to protect or preserve evidence in the jurisdiction.[174]

In *Company 1 v Company 2,* the English High Court dismissed an application for interim relief holding that it would be inappropriate to grant the reliefs where there was already litigation in the British Virgin Islands court and arbitration proceedings seated in Switzerland.[175] The court also found that it was inappropriate because of the tenuous link that the dispute had to England and Wales as none of the parties had any link with England.[176]

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167 EWHC 2486 (Comm).
168 ibid para 1.
169 ibid para 27.
170 ibid para 30.
171 *Cetelem SA v Roust Holdings Limited* [2005] EWCA Civ 618, para 76
172 ibid para 63.
173 English Arbitration Act, Section 2(3)(b).
174 Hakeem Seriki, *Injunctive Relief And International Arbitration (1st Edn, Informa Law from Routledge 2014)*86. [Seriki].
175 [2017] EWHC 2319 (QB), para 91.
176 ibid para 90.

Lastly, the court followed the guiding principle established in *Econet Wireless Ltd v Vee Networks Ltd* that the natural court for granting interim injunctive relief is the court of the country of the seat of arbitration.[177] (the "Econet Wireless Case").

In the Econet Wireless Case, the English High court set aside a freezing injunction and held that the English court was not the appropriate forum for an application for an injunction in aid of an arbitration, since the seat of the arbitration was Nigeria and not England.[178] In its reasoning, the court observed that there was no reason advanced in support of a proposition that the English court should make an order in support of a Nigerian arbitral process.[179] As a result, considering that neither the respondents had any connection with nor had assets in England and Wales, it was inappropriate for the injunction to have been granted in the first place.[180] The court also agreed with the submission that the natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration (in this case Nigeria), especially where the curial law of the arbitration is that of the same country.[181]

The principle in the Econet Wireless Case was extensively analysed in the case of *U&M Mining Zambia Ltd v Konkola Copper Mines PLC* (the "U&M Case") where an issue arose as to whether English courts had exclusive jurisdiction to grant interim measures in support of a London-seated arbitration pending the constitution of the arbitral tribunal.[182] In the case, both parties were incorporated under Zambian law and in their mining contracts, the parties had selected London as the seat of arbitration and Zambian law as the governing law.[183] The contracts also provided that the High Court of Zambia

177 [2006] EWHC 1568; Ibid para 81.
178 2006] EWHC 1568 (Comm), para 25.1. The Shareholders Agreement provided for Nigerian federal Law as the governing law and Nigeria as the seat of arbitration. In addition, the disputes resolution clause provided for arbitration in Nigeria in accordance with UNCITRAL Rules, by three arbitrators appointed by the Chief Judges of the Federal High Court of Nigeria.
179 ibid.
180 ibid para 19.
181 ibid.
182 [2013] EWHC 260 (Comm) paras 2 and 3.
183 ibid.

had exclusive jurisdiction to execute the arbitral award.[184] The claimant sought an interim anti-suit injunction to stop the Defendant from pursuing court proceedings in Zambia.[185] The court was not persuaded that the English court could, or if it could, would, make such an order in a dispute between two Zambian companies on the operation of a copper mine in Zambia. According to the court, Zambia was the natural forum for judicial assistance by way of interim measures pending the appointment of the arbitrators, and not in England [though the seat of arbitration was England].[186]

While concluding on the issue whether English courts had exclusive jurisdiction to grant interim measures in support of a London-seated, the court found that a party may exceptionally seek interim measures in some court other than that of the seat, if for practical reasons the application can only sensibly be made there, provided that the proceedings are not a disguised attempt to outflank the arbitration agreement.[187] This means that the courts of the seat of arbitration do not have exclusive jurisdiction to grant interim measures.[188]

Although the reasoning of the court in the U&M Case may seem like an intrusion on party autonomy to choose the seat of arbitration, it is commercially pragmatic as it recognises the difficulty and impracticality in some cases to apply to courts at the seat for interim measure thereby making it more effective to apply for interim measures in courts in other jurisdictions.[189]

In addition to the factors already discussed in this section, English courts also take into account other considerations in determining whether it is appropriate to grant interim measures in support of foreign-seated arbitrations. For instance, the courts consider whether there is sufficient

184 ibid para 25
185 ibid para 1.
186 ibid para 71,
187 ibid para 63.
188 Seriki (n 174).
189 David Ndolo, 'Arbitration law and practice in Kenya as compared to the UK and US with specific focus on anti-suit injunctions and arbitrability of disputes' (PhD Thesis, Coventry University 2020) 142.

connection with England and Wales through the presence of defendants or their assets.[190]

However, even if there is sufficient connection, the English courts may decline to grant the interim measures where it is inappropriate to do so, especially if the foreign seat has similar procedural laws with England and for the purpose for which they are designed.[191] Second, the court also consider whether the claimant has taken proactive steps in commencing the arbitration proceedings in the foreign seat.[192] In the case of *Western Bulk Shipowning III A/S v Carbofer Maritime Trading APS*, the court found that it would be inappropriate to grant reliefs under Section 44 of the English Arbitration Act where neither arbitration in the foreign seat had been commenced nor any undertaking had been given to commence one.[193]

4.3 NOTABLE COMPARISON IN THE APPROACHES BETWEEN ENGLISH COURTS AND KENYAN COURTS IN GRANTING INTERIM MEASURES IN FOREIGN-SEATED ARBITRATIONS

English courts have consistently granted interim measures in support of foreign-seated arbitrations, developing logical and practical factors to guide their exercise of discretion. These include urgency, a sufficient connection with England and Wales, and appropriateness. In contrast, Kenyan courts have been inconsistent in their approach, resulting in the contradictory case law discussed in Part III.

In the author's view, the English courts' approach is primarily anchored in the clear and express provisions of the English Arbitration Act, a modern piece

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190 Davies (n 157) 9. See also Lord Mustill's observation in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, para 68 that since the English court had territorial jurisdiction against the defendants, it had the means of enforcing orders against them. See also *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm) where Walker J overturned a freezing injunction given in support of claims to be resolved in a New York arbitration. Walker J held that in the absence of factors linking the defendants to the jurisdiction (such as domicile or the ownership of assets inside the jurisdiction), the English court should not intervene. Furthermore, the evidence did not show that granting the injunction would be just and convenient, or that there was a sufficient level of urgency.

191 See Justice Moore-Bick in *Viking Insurance Co. v Rossdale* [2002] 1 Lloyd's Rep. 219, 301.

192 Davies (n 157) 87.

193 [2012] EWHC 1224 (Comm), para 109.

of legislation that empowers them to grant interim measures in aid of foreign-seated arbitrations. This has led to rich jurisprudence on court-ordered interim measures in aid of foreign-seated arbitrations. On the other hand, the inconsistency and incoherence in Kenyan jurisprudence stem largely from the outdated Kenyan Arbitration Act, which does not expressly define the courts' jurisdiction to grant interim measures in foreign-seated arbitrations. This statutory gap has led to conflicting case law, necessitating the discussion in this paper.

5.0 FACTORS THAT SHOULD BE CONSIDERED BY KENYAN COURTS IN GRANTING MEASURES IN FOREIGN-SEATED ARBITRATIONS

As clearly demonstrated in Part III, there are conflicting decisions as to whether Kenyan courts can grant interim measures in foreign-seated arbitration. In this section, the paper proposes disjunctive factors that should be considered by courts before assuming jurisdiction to grant interim measures in aid of foreign-seated arbitration. These factors are partly influenced by the comparative study on the power of English courts to grant such measures in Part IV, practical considerations, as well as international best practices.

5.1 LAW OF THE SEAT

i) Is the law of the seat modelled on the UNCITRAL Mode Law? If so, the court may assume jurisdiction on the basis that Kenyan Arbitration Act has similar provisions with the law of the seat, and both statutes recognise the principle that it is not incompatible with the arbitration agreement for a party to apply for interim measures from court. In some cases where the law of the arbitral seat is not modelled on the UNCITRAL Model Law but has similar provisions to the Model Law, for instance the English Arbitration Act, the court may assume jurisdiction where there is no express restriction on the ability of the parties to apply for interim measures in a foreign court.

ii) Does the law of the seat prohibit obtaining interim measures from a national court? Where the law of the seat does not expressly restrict the application of interim measures to its own courts, Kenyan courts

can assume jurisdiction and grant interim measures in aid of the intended foreign arbitration.

iii) Whether the grant of the interim measures will interfere or usurp the supervisory jurisdiction of the courts of the seat of arbitration. Kenyan courts should be cautious not to encroach upon the default supervisory power of the courts at the seat when granting specific interim measures.

iv) Are the interim measures in Kenya available and enforceable at the seat of arbitration? Practically, national courts will apply their own law to the availability and form of court ordered interim measures.[194] However, national courts must ensure that the interim measure requested in aid of foreign-seated arbitration are available and recognised under the seat of arbitration.[195]

v) Does the law of the seat have enforcement provisions and mechanisms similar to Kenya such that the interim measures can be enforced at the seat? This is important because the party in whose favour interim measures are granted may seek enforcement in courts of the law of the seat.

5.2 ARBITRATION CLAUSE AND GOVERNING LAW

a) Does the arbitration clause expressly exclude applying to a court of competent jurisdiction for grant of interim measures? The court must ascertain whether the arbitration clause limits the parties to specific foreign courts where interim measures should be sought. Alternatively, the court should consider whether the arbitration clause expressly excludes the jurisdiction of Kenyan courts in granting interim measures.

b) Is the arbitration clause governed by Kenyan law? If the arbitration clause is expressly governed by Kenyan law. Then, notwithstanding the fact that the law of the seat may be foreign, the court may assume jurisdiction on the basis that Kenyan law, including the Kenyan Arbitration Act and its provision on interim measures, will be applicable to the arbitration clause.

194 Born (n 3) 3998.
195 ibid.

c) Have the parties expressly contracted out of the right to apply for interim measures before courts in their arbitration agreement? If so, the court should uphold the parties' autonomy to forego the right to apply for court-ordered interim measures in favour of centralising dispute resolution in a single arbitral forum and promoting efficiency.
d) Whether the arbitral rules permit a party to apply for interim measures from any competent authority? If so, the court should consider whether there are any conditions imposed by the rules before applying for interim measures before national courts. For instance, while the ICC Rules provide that before the file is transmitted to the arbitral tribunal, any party may apply to any competent judicial authority for interim or conservatory measures.[196] Even after the arbitral tribunal has been formed, a party may apply to a court for interim measures when it is appropriate to do so. The Secretariat must be notified without delay of such application. Similarly, the London Court of International Arbitration (LCIA) Rules permit a party to apply to a competent state court or other legal authority for interim or conservatory measures (i) before the formation of the Arbitral Tribunal and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award.[197]

5.3 SUBJECT MATTER

When presented with an application for interim measures, the court should consider the nature and location of the subject matter. In addressing this question, the court should ask itself the following questions:

a) Is the subject matter or the assets in Kenya? If so, the court may assume jurisdiction on the basis of territorial jurisdiction. This is because in some circumstances, the court where the assets are located is the only practically effective forum for applying for interim measures.[198]

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196 Article 28(2) International Chamber of Commerce (ICC) Rules 2021.
197 Article 25.3 London Court of International Arbitration (LCIA) Rules 2020. See also Article 30.3 of the Singapore International Arbitration Centre Arbitration Rules and Article 37(5) of the Stockholm Chamber of Commerce Arbitration Rules.
198 Born (n 3) 3989.

b) Is the contract being performed in Kenya? While performance of the contract in Kenya does not mean automatic assumption of jurisdiction by Kenyan courts, as parties can select foreign law to govern their contract and subject themselves to the jurisdiction of foreign courts, it may be impracticable in some circumstances to promptly and cost-effectively seek interim measures in those foreign courts. Furthermore, it is arguable that an arbitration clause cannot oust the territorial jurisdiction of Kenyan courts, especially where the contract is being performed in Kenya.[199]

c) Does one of the parties carry on business in Kenya and whether one of the parties to the arbitration agreement is a Kenyan or a Kenyan incorporated entity? The court may assume jurisdiction based on the fact that a state exercises jurisdiction over its nationals or legal persons incorporated in its territory.

d) Whether there is a real and substantial connection to Kenya. The real and substantial connection test has been extensively discussed by the Canadian Supreme Court in *Club Resorts Ltd v Van Breda* where it laid down the legal test for when a Canadian court should assume jurisdiction over an out-of-province defendant.[200] According to the Supreme court, in determining whether a court can assume jurisdiction over a certain claim, the preferred approach in Canada is to rely on a set of specific factors which are given presumptive effect, as opposed to a regime based on individualized judicial discretion.[201] These include: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) the dispute arose from the territory of the state; and (d) a contract connected with the dispute was made in the province.[202] Where a connecting factor is established, a presumption of jurisdiction will arise, but that presumption may be rebutted by the party challenging jurisdiction.[203] The court noted that the list of factors is not exhaustive, and courts have the discretion to recognize additional factors.[204] It set out

199 Malcom Shaw, International Law (6th edn Cambridge University Press, 2008) 652.
200 [2012] 1 S.C.R. 576.
201 ibid.
202 ibid.
203 ibid.
204 ibid.

the following framework with respect to the evaluation of new presumptive factors:(a) Similarity of the connecting factor with the recognized presumptive connecting factors; (b) Treatment of the connecting factor in case law and statute; and (c) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.[205]

While the above case was specific to Canada, the principles laid down by the court can offer some guidance and persuasion to Kenyan courts and other courts globally, when establishing whether there is a real and substantial connection.

5.4 INTERIM MEASURE BEING SOUGHT

a) Is the application for interim measures urgent? In addition, whether the subject matter will be dissipated if the interim measures sought are not granted.
b) What form of interim measures is being sought and whether the purpose of interim measure sought is similar to the purpose at the seat of arbitration. In Commerce and *Industry Insurance Co of Canada v Lloyd's Underwriters* [2002] 1 Lloyds Rep 219, the court refused to exercise its power to order the examination of witnesses in England under section 44(2)(a) of the AA 1996, in a foreign-seated arbitration in New York. The court observed that as a matter of English law, the purpose of the examination was providing evidence for trial, whereas under the New York curial law, the purpose of the examination was investigating whether the witness might have any information relevant to the case.
c) Is it practical, convenient, and proper in the circumstances to apply for interim measures in Kenyan courts, as opposed to other national courts or the courts at the seat?
d) Does the grant of interim measures bind parties to their agreement to arbitrate? Where the interim measure sought aids a party to circumvent

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205 ibid.

the agreement to arbitrate, then the court should decline to exercise its jurisdiction as this will be contrary to the parties' agreement to arbitrate.[206]

e) Is the grant of the interim measures contested by the parties? If the opposing parties do not contest the grant of interim measures, the court may exercise discretion and grant the interim reliefs sought where the relevant tests for the specific interim measure are met. However, in practice, it is unlikely that the party on the other side of dispute does not challenge the application for interim measures.

f) Is it fair and just in the circumstances to grant the interim measures sought?

g) Does the grant of the interim measures or entertaining the application invite the court to examine the merits and usurp the powers of the arbitral tribunal?[207]

h) Whether the interim measures sought can only be maintained by pursuing the substantive claim before the court. In *SRS Middle East FZE v Chemie Tech DMCC*, the English High Court held that interim measures should not be granted where security or other interim protective measures can only be obtained or maintained by pursuing a claim on the merits in the court that granted those measures.[208] In the court's view, this contradicts the commencement of court proceedings for the sole purpose of obtaining interim measures in support of the arbitration.[209]

i) How long will the interim measures be in place? The court should consider the duration because granting interim measures for long periods of time may lead to enforcement issues at the seat of arbitration.

5.5 EXISTENCE OF APPOINTMENT OF AN EMERGENCY ARBITRATOR UNDER THE INSTITUTIONAL RULES GOVERNING THE ARBITRATION

a) Do the institutional arbitration rules governing the arbitration allow for the appointment of an emergency arbitration to grant the interim measures

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206 Born (n 3) 3995.

207 Al Jazy Omar Mashhoor Haditheh, 'Some Aspects of Jurisdiction in International Commercial Arbitration' (PhD Thesis, University of Kent 2000) 249. See also *Channel Tunnel Group Ltd v. Balfour Beatty Constr. Ltd [1993] AC 334, 358 (House of Lords).*

208 [2020] EWHC 2904 (Comm).

209 ibid.

sought? While institutional arbitration rules do not prohibit parties from applying to national courts even with the existence of provisions on emergency arbitrator, the court may need to ask itself whether it is appropriate for it to grant the interim measures sought notwithstanding the existence of other avenues, such as provisions of emergency arbitrators who may equally grant the interim reliefs sought.[210]

b) Will the emergency arbitrator's order be voluntarily executed.[211] This consideration emphasizes the limitation of emergency arbitrator provisions.

5.6 CONDUCT OF THE PARTIES

Has the party applying for interim measures taken steps to advance arbitration to indicate that there is an intention to respect the agreement to arbitrate.[212] This may take the form of presenting proof of filing the request for arbitration.[213]

5.7 ARBITRAL TRIBUNAL

a) Has the arbitral tribunal been constituted?

b) If so, whether the arbitral tribunal is able to grant the interim measures sought and whether it is able to act effectively?[214] Where the arbitral tribunal is in existence and is able to grant the interim measures or appointing an emergency arbitrator is possible and likely to be effective, it may be appropriate to apply first to that tribunal or emergency arbitrator for interim measures, unless international enforcement may be

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210 Article 29.7 ICC Arbitration Rules 2021. See also Article 9.1.3 of the LCIA Arbitration Rules which provides notwithstanding the provisions of emergency arbitrator in Article 9B, a party may apply to a competent state court or other legal authority for any interim or conservatory measures before the formation of the arbitral tribunal; and Article 9B shall not be treated as an alternative to or substitute for the exercise of such right. During the emergency proceedings, any application to and any order by such court or authority shall be communicated promptly in writing to the emergency arbitrator, the Registrar and all other parties.

211 Redfern and Hunter (n 27) 426.

212 ibid.

213 ibid.

214 William Wang, 'International Arbitration: The Need for Uniform Interim Measures of Relief' (2003) 28 *Brooklyn Journal of International Law*, 1059,1087

required.[215] Has the authorisation of the arbitral tribunal been obtained by the party seeking interim measures?[216]

6.0 CONCLUSION

Interim measures are an indispensable part of the arbitral process.[217] They maintain the *status quo* pending the determination of the dispute by the arbitral tribunal and ensure that actions taken by an adverse party during arbitration proceedings do not render the arbitral award futile. Court-ordered interim measures are necessary in circumstances where the arbitral tribunal is yet to be constituted or is unable to act. Besides, an arbitral tribunal can neither compel third parties nor enforce their orders. It is for this reason that the UNCITRAL Model Law and various arbitration institutional rules recognize that recourse to courts for interim measures is not an infringement or a waiver of the arbitration agreement.

Ordinarily, courts at the seat of arbitration are the natural forum for granting court-ordered interim measures. However, as demonstrated by this paper, such jurisdiction is not exclusive but is concurrent, as was held in the U&M Case. In some cases, it may be urgent yet impracticable and unrealistic to apply to the courts at the seat of arbitration to prevent the dissipation of assets. Moreover, it may not be rational or commercially viable to apply to the courts of the seat where the assets or performance of the contract are in Kenya or another country, among other factors.

As Kenya seeks to establish itself as a regional hub for international arbitration, its courts should have the power to grant interim measures in support of foreign-seated arbitrations. The Skoda Case contradicts this aspiration because the court held that the High Court lacks jurisdiction to grant interim measures in support of foreign-seated arbitrations and held that it was only the courts at the seat (London) that could grant the measures sought.

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215 Redfern and Hunter (n 27) 426.

216 Article 25.3 of the LCIA Rules requires parties to seek the authorization of the arbitral tribunal where it has been formed before applying for interim measures in a state court.

217 Ross (n 12) 421.

To be fair to the Skoda Case, the Kenyan Arbitration Act does not expressly provide that Kenyan courts have the power to grant interim measures in aid of foreign-seated arbitrations. This power is implied from the reading of Sections 2 and 7 of the Kenyan Arbitration Act. Therefore, there is a need to amend the Kenyan Arbitration Act and codify the positions in the CMC and Isolux Cases to expressly empower Kenyan courts to grant court-ordered interim measures in foreign-seated arbitrations. These amendments will create more certainty and promote international arbitration.

The current uncertainty surrounding the jurisdiction of Kenyan courts to grant interim measures in foreign-seated arbitrations poses practical challenges for parties and investors, who are often compelled to seek such orders from courts at the arbitral seat. This results in increased legal costs associated with seeking interim measures from the court at the seat. But most importantly, the inability to obtain interim relief locally, especially when the subject matter is in Kenya, poses a serious risk to the intended arbitration, as assets may be dissipated before proceedings even commence, ultimately frustrating the enforcement of the resultant arbitral award. In the author's view, Kenyan Courts have an international obligation stemming from the UNCITRAL Model Law and the New York Convention to facilitate the success of international arbitration. By granting interim measures in foreign-seated arbitrations, Kenyan courts would be fulfilling this commitment. Enhancing judicial support in this regard through sensitization and advanced training of judges would reinforce Kenya's position as an arbitration-friendly jurisdiction and promote confidence in its arbitration framework.

Other countries, such as India, amended her Arbitration and Conciliation Act to cure the uncertainty and provide that Indian courts have powers to grant interim measures in foreign-seated arbitrations.[218] The Arbitration and Conciliation (Amendment) Act, 2015 added a proviso to Section 2(2) of the

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218 On the general discussion of the power of Indian courts to grant interim measures in support of foreign-seated arbitrations. See Muskan Agarwal and Amitanshu Saxena, 'Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty' (2021) 7 *National Law School Business Law Review* 73.

Indian Arbitration and Conciliation Act 1996 that allowed Section 9 (provision relating to interim measures by court) to be applicable in support of foreign-seated arbitrations.[219] Tanzania recently enacted its Arbitration Act 2020, which has express provisions similar to the English Arbitration Act, allowing Tanzanian courts to grant interim measures in support of foreign-seated arbitrations.[220]

Until the Kenyan Arbitration Act is amended, the factors proposed by Part V of this paper will be a useful guide to courts when considering assuming jurisdiction to grant interim measures in support of foreign-seated arbitrations. Even after the amendment of the Arbitration Act, those factors remain important when courts are considering not to assume jurisdiction, especially where it would be inappropriate to do so.

219 ibid.
220 See the Tanzanian Arbitration Act 2020, Sections 46, 5(3) and 5(4).

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