

# Enforcement of Arbitral Interim Measures Under the Nigerian Arbitration and Conciliation Act

Anugbum Onuoha

Faculty of Law, Rivers State University, Port Harcourt, Rivers State, Nigeria

**Email address:**

[anugbum@yahoo.com](mailto:anugbum@yahoo.com)

**To cite this article:**

Anugbum Onuoha. Enforcement of Arbitral Interim Measures Under the Nigerian Arbitration and Conciliation Act. *Science, Technology & Public Policy*. Vol. 5, No. 1, 2021, pp. 19-28. doi: 10.11648/j.stpp.20210501.12

**Received:** December 8, 2020; **Accepted:** January 13, 2021; **Published:** March 17, 2021

---

**Abstract:** In securing the interests of the parties to an arbitration agreement, arbitral interim measures are of considerable importance. Due to the capacity of arbitral tribunals and courts to grant and enforce interim measures that make the final award meaningful, arbitration, as a litigation procedure, is becoming increasingly effective. The value of interim measures has grown in recent years in Nigeria as more parties to commercial arrangements and transactions are requesting them, and is expected to expand even more in the coming years. This paper discusses the challenges concerning arbitral interim measures in Nigeria's arbitral proceedings; as such questions pose a challenge to arbitration in the present legal framework. The purpose of the paper is to define, examine and propose solutions to those issues that delay arbitral proceedings or sabotage the nexus of the disputes. Also, the paper illustrates the difficulties faced by arbitrators in granting and implementing interim measures during arbitral proceedings, as a result of the shortcomings of the present Arbitration and Conciliation Act of 1990 that gives tribunals' rather limited control. The paper further aims to explain that arbitral tribunals should be granted sufficient and substantive power to provide arbitral interim measures to compel parties to conform with the arrangement and to respect the party's autonomy in arbitration agreements.

**Keywords:** Arbitration, Interim Measures, Provisional Measures, Party Autonomy

---

## 1. Introduction

Interim measures have a major role to play in fostering both conventional litigation and arbitration. In arbitration, the position that interim measures play varies widely from country to country. Three frameworks worldwide have transitional measures, described by Sherwin and Rennie as "the court model", "the model of free choice" and "the model of court subsidiarity" [1]. The first model is where the arbitral tribunal is the exclusive body to award interim measures; the second model is where the right to award interim measures is reserved wholly for the courts; the third is where both the arbitral tribunal and the courts hold these powers concurrently [1]. In Nigeria, the Arbitration and Conciliation Act (ACA)<sup>1</sup> creates a dual-system of granting of interim or interim measures over an arbitration, where both the Arbitral Tribunal and the Court can grant or make interim

orders<sup>2</sup>. However, it should be noted that the supremacy of the arbitral tribunal is more profound in all three categories and that the involvement of the courts is subsidiary<sup>3</sup>. Nonetheless, the authority to grant interim measures is primarily delegated to the arbitral tribunal under Article 13 of the Act, which deals with the powers to grant interim measures.

Interim measures are temporary relief grants aimed at securing the interests of the parties awaiting the final settlement of disputes. The provisional steps emerge from the parties' contractual duty to determine the dispute through the arbitration process. Individuals going to arbitration expect that the arbitral tribunal would conduct its tasks promptly and

---

<sup>2</sup> Article 26, Arbitration Rules (First Schedule to the Arbitration and Conciliation Act)

<sup>3</sup> Notably, the power of a Nigerian Court to grant an order of injunction pending arbitration is traceable to the provisions of Section 13 of the Federal High Court Act and Section 18 of the High Court of Lagos State Law, which endows both the Federal and State High Courts with the powers to grant an order of interim injunctions where it will be just and convenient to do so.

---

<sup>1</sup> CAP. A18, Laws of the Federation of Nigeria 2004.

adequately and shall provide full enforcement of all interim and provisional steps to make the dispute resolution process effective. The parties to the arbitration agreement are aware of the need to protect their contractual commitments in conflicts. Admittedly, people prefer arbitration because they are told that it is the conflict process that is best suited, whether present or future, to any dispute.

Many other jurisdictions accept the procedural importance of interim measures as a supplement to final awards in the context of international arbitration. Interim measures could be crucial because of the special risks involved in commercial disputes. The success of the arbitration process as a whole also depends on interim measures that could prohibit competing parties from reducing or withdrawing assets to make the final awards worthless. Indeed, interim measures are intended to mitigate losses, penalties or biases during the proceedings or to encourage the enforcement of the awards. Several remarks about the arbitral tribunal's perceived ineffectiveness in enforcing interim measures have been made over the years, resulting in significant pressure from both legal and corporate circles to change both legislation and rules on interim measures on arbitration<sup>4</sup> and this paper aims to proffer some solutions to this.

## 2. The Nature of Interim Measures in Arbitral Proceedings

While interim measures are generally recognized and enforceable in many legal jurisdictions, the definition of the interim measures or the concept of interim measures is not universally accepted. In other words, the concept of interim measures does not have any apparent uniformity in both public and private international law. Also, there is no definition found in international commercial arbitration of that term or its scope. Broadly speaking, an interim measure is a procedure protecting the interests of disputing parties awaiting its successful conclusion [2]. The UNCITRAL (United Nations Commission on International Trade Law) revised version of the Model Law<sup>5</sup> defines "interim measures" as:

"any temporary measure by which, at any time prior to the issuance of the award by which the disputes is finally decided, the arbitral tribunal orders a party, for example, and without limitation to:

- (a) Maintain or restore the status quo pending the determination of the disputes;
- (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."

Interim measures can be defined as "measures designed to retain a legal or substantive state to safeguard interests, and an application for recognition has been made to the court with jurisdiction as to the substance of the matter" [3].

The primary aim of the interim measures in arbitral proceedings is to ensure that the rights of the parties are not breached or violated, regardless of the duration of the arbitration proceeding. The function of the interim measures is, in other words, to encourage the effectiveness of judicial or arbitral protection by providing interim measures complementary to the final award. The basic justification for the interim measures is that of the 'fumusboniuris' (an apparent existence of the right) and the 'periculum in mora' (the risk of imminent infringement of the right) [3]. It is for this reason that it should be possible for tribunals and courts to grant interim measures to prevent the anticipatory effects of the judgment.

However, there are some important aspects of interim measures that will be discussed in this paper. The first aspect is that demands for interim measures and the presence of a disagreement are now or may be pursued within the same forum or in another forum [4]. There needs to be a dispute to be litigated, in other words. This ensures that only where final protection is sought should interim measures be available. Undeniably, the function means that an interim measure will never become "*res judicata*", and the consequences are restricted to the relief granted in the principal trial<sup>6</sup>.

The second feature is the transient nature of interim measures. The measure is subject to a final adjudication by the tribunal. An interim measure is temporary and is only required for a short period specified [5] until a final order is granted or awarded. Interim measures, therefore, safeguard the interests of the parties waiting for the final award. The interim measures will not exceed the final relief and are intended to augment the secondary relief for the final award.

Third, they are only awarded if there is an actual risk of waiting for the final award; that is if the property can be dissipated or taken to a haven that makes the final award worthless and pointless because it would have been sold by the defendant before the final award. There has to be an immediate need for the tribunal or court to grant these measures, and for all measures sought by the party to be granted all conditions have to be met fully [6].

Fourthly, interim measures, if the situation of the progress of the arbitral proceedings so requires, can be revalued, changed or rescinded before a final award or final judgment is made. There is no need for interim measures when the final award on the merits addresses all the needs of the parties to a case.

Interim measures during arbitration are usually triggered by a party request or demanded by a Party to the Arbitration

<sup>4</sup> <https://core.ac.uk/download/pdf/232783391.pdf>;  
<https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2019/06/GT-GJIL190018.pdf>.

<sup>5</sup> UNCITRAL Model Law on International Commercial Arbitration (2006), available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

<sup>6</sup> *SPDC v Crestar Integrated Natural Resources Ltd* (2015) LPELR-40034.

Agreement [7]. It is impossible to conceive of any circumstances where interim measures may be needed but in which no party makes a request. The point is that the tribunal serves as a facilitator of the proceedings by parties requesting interim measures from the tribunal to uphold the principle of party autonomy as well as to guarantee that contractual duties are met by the parties [8]. Ali Yesilirmak, a notable scholar on international commercial arbitration, asserts that a request for interim measure should be party-oriented [9]. It is worth noting that some international rules often give the arbitral tribunal power to grant provisional measures without a party-oriented procedure<sup>7</sup>. It should be noted that under the UNCITRAL Model Law, it is the claimant that must request for the interim measures. This is to maintain the principle of party autonomy.

According to the principle of party autonomy, parties are free to pursue interim measures where they are provided under the arbitral agreement [8]. Perhaps the key aim of enabling the Arbitral Tribunal, on its own volition, grant such a request is to prevent broader controversy and thus to allow the Arbitral Tribunal to continue smoothly, effectively, and effectively with the arbitration [10]. There is a temporary dimension of arbitral jurisdiction. After its establishment, starting or during an arbitral process, an arbitral tribunal shall be authorized to take or grant interim measures at all levels<sup>8</sup>. As the word indicates, interim measures are meant to have only an interim effect until the final settlement of the dispute. They are not intended to have a *res judicata* effect [11]. It should be noted that before the final award, such interim measures may be revoked or finalized at the discretion of the arbitral tribunal [11].

In particular, the ACA and the Arbitration Rules do not provide for how a request for an interim measure would be made or the timeframe within which it would have to be brought before the arbitral tribunal. However, the rules from other jurisdictions<sup>9</sup> provide some guidelines which may be embraced by the arbitral tribunal in Nigeria. In the first place, an arbitral application should include or define the rights to be protected, the measures demanded and the circumstances in which such measures are appropriate.<sup>10</sup> It can be argued that the arbitral tribunal will possibly not grant any measure without a credible justification. In the absence of any of the above elements in the application, the tribunal may certainly require the party concerned to provide more details relating to the conditions before taking its decision. The provisions of the rules include the temporary aspect of the length of an interim measure<sup>11</sup>. Under the present framework, an interim measure may be issued by an arbitral tribunal either after its formation, upon the commencement of arbitral proceedings

or during the course of its proceedings<sup>12</sup>. However, once the tribunal becomes “*functus officio*”, it has no power to grant interim measures<sup>13</sup>.

If a deadline for filing a motion to reserve a final award expires, the main consequences of the Interim measure can further cover uncertainty. It is important to note that the tribunal's final award could contain a ruling reiterating or amending or revoking the previous interim measure [11]. However, it is worth noting that the previously granted interim measures may be amended, modified or revoked even before the final award is awarded, in changing circumstances or by new facts<sup>14</sup>. The form of the interim measures will in these circumstances become the pivotal point for deciding whether this revocation can be made. Various arbitration tribunals are authorised to review or revoke their provisional measures.

### 3. Arbitrator's Powers to Grant Interim Measures

As noted earlier, the consent to arbitrate is a pre-requisite of any arbitral proceedings, which is primarily based on the principle of party autonomy [4]. Section 13 of the ACA provides as follows:

Unless otherwise agreed by the parties, the arbitral tribunal may before or during an arbitral proceeding-

- (a) at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute; and
- (b) require any party to provide appropriate security in connection with any measure taken under paragraph (a) of this section

The arbitration agreement is therefore the primary source of authority and the jurisdiction of the arbitral tribunal. The parties may agree to restrict the jurisdiction of the arbitral tribunal to particular matters and they are equally free to decide to arbitrate instead of recourse to formal national courts.<sup>15</sup> However, only arbitrable (in other words, capable of being resolved by arbitration) matters can be determined under arbitration as well as issues that are not central to public policy<sup>16</sup>. Arbitrators should respect the limits of their powers as set out in the arbitration, moreover since the arbitration agreement is the primary source of the jurisdiction as well as the power of the tribunal.

The arbitral tribunal should be the best forum for seeking interim measures, given the fact that it derives its authority from the arbitration agreement (party autonomy) [12]. There are strict conditions, however for the arbitral tribunal to take

7 Art. 39 and 47, ICSID; Rule 7 (9), Chartered Institute of Arbitration; Art. 41, Statute of International Court of Justice.

8 *SPDC v Crestar Integrated Natural Resources Ltd* (2015) LPELR-40034.

9 Such as the Arbitration Rules of England, LCIA Rules, ICSID Rules and the UNCITRAL Model Law.

10 This can be found under Art. 39 (1), ICSID Rules.

11 *Christlieb PLC & Ors. v Majekodunmi & Ors* (2008) LPELR-8453.

12 *MTN v Hanson* (2017) LPELR-48456.

13 *NNPC v Roven Shipping Ltd & Anor* (2014) LPELR-22540.

14 *Leedo Presidential Motel Ltd. v Bank of the North Ltd.* (1998) 10 NWLR (Pt. 696) 364.

15 *Robinson v Bland* [1865] 2 Burr 1075.

16 *Compagne Generale De Geophysique v Etuk* (2003) LPELR-5516; *Statoil (Nigeria) Ltd & Anor. v FIRS & Anor* (2014) LPELR-21344.

advantage of its powers to grant interim measures. These strict conditions are more addressed than litigation cases, so the arbitral jurisdiction is established as the best dispute mechanism for arbitral proceedings<sup>17</sup>. In the context of arbitral proceedings, for a tribunal to have jurisdiction to grant interim measures, it must first determine whether the parties have been given such jurisdiction to make an order for interim relief. Without a doubt, after the tribunal has been established, the conditions or standards and procedures for the granting of interim measures are then laid down [9]. This approach to the determination of standards and procedures makes it easier for arbitral proceedings to be predictable and consistent and thus makes arbitral proceedings more effective and efficient. As previously stated, this standard and procedure usually aim at preserving the status quo, promoting the application of future or current awards and facilitating the determination of disputes.

While many legislation and arbitration rules remain silent in relation to the question of arbitrary requirements and procedures for interim measures, arbitrators have broad powers and wide discretion to lay down arbitral principles [13]. It is important to point out that commercial arbitration has no legal precedent like traditional litigation cases and thus each case is determined according to its merits [14].

In developed legal systems, contemporary litigation and arbitration are accompanied by procedural safeguards and the opportunity to be heard by all parties. One unavoidable effect of these procedures is a delay in the final settlement of the disputes by the parties and, in turn, this delay may impact one of the parties, often causing irreparable damage; for example, the dissipation of properties, the destruction of evidence, the loss of market value and the interference with strategic alliances. If one party deliberately tries to postpone dispute proceedings to impose pressure on its opponent, such harm can be compounded. In the light of the foregoing, with the assistance of the courts, the arbitral tribunals have developed guidelines and procedures for the granting of immediate interim measures to protect the parties from a serious injury that would lead to delays in the arbitration process [9]. Thus, the purpose of the arbitral tribunal's final relief may be lost and pointless and the parties may incur significant harm or excessive costs unless the arbitral tribunal establishes procedures or requirements for the granting of interim measures.

In deciding the criteria it is the responsibility of the arbitral tribunal to take account of the transient nature of interim measures. The criteria must be pragmatic to satisfy the practical conditions of arbitral disputes. The tribunal assesses case law, arbitration rules and rulings, and also conducts a comparative evaluation of international arbitral rules to determine interim measures procedures and criteria.

Furthermore, the UNCITRAL Model Law confirms the authority of the tribunal to create requirements for the granting of an interim measure<sup>18</sup>. The procedures applied by

an arbitral tribunal are preliminarily defined or at least strongly affected by contractual obligations agreed to by the parties to the agreement. The parties may agree under certain circumstances that the claimant may only be granted such interim measures or injunctive relief upon the fulfilment of some agreed conditions [15]. It should further be noted that arbitral institutions have not provided clear meaningful standards for the granting of interim relief. Most arbitral institutions provide that a tribunal may grant such interim relief as it "deems necessary or appropriate" [15]. In the commercial context, most institutions dealing with arbitral interim measures consider as appropriate requirements: (1) serious or irreparable injury to the claimant; (2) urgency; and (3) no meritorious prejudice; and, while some arbitral tribunals expect the claimant to pose a *prima facie* case in relation to the merits of the case [10].

It can also be argued that the lack of clarity on conditions for granting interim measures was one of the reasons for having the arbitral tribunal to deal with the issue, that only the tribunal can foresee the types of remedies required in the various cases. A standardized set of conditions would impede the autonomy of the Party so that the Tribunal may not be able to adapt to the prevailing commercial circumstances if the trade changes due to the economic patterns of supply and demand.

The arbitral tribunal may, in theory, take guidance from arbitral case law as well as a comparative review of arbitration conventions and rules in granting any interim measure [1]. An analysis of both academic and arbitral opinions shows that there are general conditions, both constructive and negative, which the arbitral tribunal must take into account before granting an interim measure. The tribunal will not refuse any party requesting an interim remedy unless a rejection may violate the party's interests (party autonomy) [11].

In fact, when determining whether or not to grant a measure, an arbitral tribunal may weigh the essence of the interim measure sought and the relative harm sustained by each party. For example, interim measures; performance of a contract or protection of the status quo, the applicant must show or demonstrate necessity, injury and *prima facie* argument, however, for example, interim measures; preservation of facts, confidentiality, the security of costs do not require the same proof<sup>19</sup>. It may be argued that such lacunae provide the arbitral tribunal to grant interim measures under the probability principle or greater likelihood or the material risk or harm if the measure is not granted.

#### *POWERS OF THE COURTS IN GRANTING MEASURES IN SUPPORT OF ARBITRAL PROCEEDINGS*

Numerous arbitration laws and legislation today presume that the court and arbitration are qualified to award interim measures in commercial arbitration at the same time. Article 26 (3) of the Arbitration Rules states that interim measures can be presented either before an arbitral tribunal or before a

<sup>17</sup> *SPDC v Crestar Integrated Natural Resources Ltd* (supra).

<sup>18</sup> Article 17A (1) and Article 26 (2) (b), UNCITRAL Model Law.

<sup>19</sup> Ibid.

judge. In *Lagos State Government v. PHCN & 2 Ors*<sup>20</sup>, The Lagos State High Court ruled that it had jurisdiction, according to Article 26 (3) of the Arbitration Rules, to issue an order for interim relief awaiting arbitration, even though the arbitration proceedings were continuing between the parties to the action.

As mentioned above, arbitration is generally a procedure carried out in conjunction with the arbitration arrangement (party autonomy) and interim measures during arbitration are an intermediary between private dispute settlements [12]. The dynamic and ever-changing interface between the courts and the arbitral tribunal, as noted by some legal commentators, is the discordant result of an arrangement between the parties to the arbitration agreement [1, 4, 10].

Furthermore, arbitration is not purely a private matter of contract in which parties have given up all their rights to engage judicial power and it is not wholly divorced from the exercise of public authority. Arbitration relies entirely on the underlying support of the courts, which alone have the authority to save the mechanism when one party tries to sabotage it, despite the outcry of party autonomy. Before or during the arbitral proceedings, courts may be invited to resolve the matter of arbitration jurisdiction<sup>21</sup>. In *Eketrim v Vivendi Universal*<sup>22</sup>, where the parties decided to resolve their disputes under LCIA to prevent contradictory Geneva decisions. Thus, since a stay would violate party sovereignty, the court declined to issue an anti-suit injunction. The powers granted by the parties or any set of rules shall be legal within the limits of “*lex arbitri*” [16]. In other words, the courts derive their power from the Laws while the arbitration derives its powers from the parties.

It should be understood that the preference in the arbitration is to resolve interim measures privately, so it makes sense to insist that courts do not intervene in the arbitration process. However, as a private procedure, arbitration is not self-executing and must rely on the coercive powers of the courts before and after the arbitral proceedings to ensure its effectiveness [17]. In the case of *Mavani v Ralli Bros*<sup>23</sup>, The court held that if the arbitration agreement specifically mandates that a party is not to put an order of the sort at issue before a court, the presumption of autonomy of the party nearly invariably allows the courts to comply with the agreement and to refrain from exercising their power. While it is believed that in order to be successful, arbitration must be autonomous from the judiciary, it is often agreed that arbitration requires the approval of the courts to be effective [18]. Looking at the case of *Strumpffabrik GmbH v Bentley Engineering Co. Ltd*<sup>24</sup>, where Kerr LJ, speaking about ICC, said that:

The rules provide a code that it intends to be self – sufficient, in the sense that it is capable of covering all aspects of arbitrations conducted under the rules, without a

need for any recourse to any municipal system of law or any application to the courts of the forum.

In other words, owing to the party autonomy doctrine, Kerr LJ asserted that English courts should be very reluctant to interfere in the arbitration process<sup>25</sup>. A harmonious relationship is thus crucial between the courts and the arbitral process. Indeed, even the most ardent supporters of party sovereignty are bound to accept that they must rely on the court to guarantee that at least some degree of effect is given to the agreement to arbitrate.

In all cases, the courts must maintain the agreement to arbitrate, as stated under section 4 (1) of the Arbitration Act<sup>26</sup>. Unlike Nigeria, some national laws and regulations, such as the 1996 English Arbitration Act, Model Law and ICC Rules, allow courts to grant interim measures prior to the existence of the tribunal or, where arbitration rules apply, do not allow interim security measures to be granted by arbitrators. In fact, one will conclude that the presence of the courts is not detrimental at this point and can be helpful to the arbitration proceedings [2]. As expressed clearly in the UNCITRAL model law, courts use their powers to bring into force the agreement of the parties by setting up an effective tribunal to deal with the conflict between the parties, if the process for nominating the arbitrators is inoperative. For example, in the case of *NV Scheep v. MV S. Araz*<sup>27</sup>, The Supreme Court of Nigeria ruled that an interim measure in favour of arbitration could only be granted by the Court if the questions at issue between the parties are submitted to the Court for its resolution. In this case, the Court declined to extend an interim security order in respect of an arbitration proceeding in London on the basis that the claimant in the proceeding had not referred the questions at issue between the parties to the Court's determination. The Court, therefore, held that the Admiralty jurisdiction of the Federal High Court could not be validly invoked for the sole purpose of securing an award in respect of the ongoing arbitration in London. In effect, the Supreme Court held that because the arbitral tribunal was responsible for deciding the matters in question between the parties, the claimant should have asked the arbitral tribunal for an order for interim relief.

Often, when the parties request interim measures, arbitral tribunals are not set up. It is up to the courts with a fixed mechanism to determine such request and grant the measure<sup>28</sup>. The composition of the tribunal can take time before it is determined and, if the parties do not appoint arbitrators on time, either of them may approach the courts to prevent the dissemination of the assets to other jurisdictions which, unless the assets are secured, may in the long term render the final arbitral award proceedings meaningless. As noted in *Kastener v Jason*<sup>29</sup>, the Court held that before arbitration was instituted, the local courts had the power to

20 (2012) 7 CLRN 134.

21 *Mobil v Suffolk Petroleum Services Ltd* (supra).

22 [2003] EWCA Civ 938 (also known as “The Epsilon Rosa”).

23 [1973] 1 WLR 468.

24 [1962] 2 QB 587.

25 *KS Bani v Korea Ship building and Engineering Corporation* [1987] 2 Lloyd's Rep 445.

26 *Statoil (Nigeria) Ltd & Anor. v FIRS & Anor* (supra).

27 (2000) 15 NWLR (Pt. 691) 622.

28 *C v D* [2007] EWCA 1282.

29 [2004] EWHC 92 Para 107-108.

issue freezing orders on asset protection. The court further held that the parties could authorize an arbitral tribunal on a provisional basis to issue freeze orders.

Given the concurrent jurisdiction of the arbitral tribunal and courts over interim measures, there is a potential inconsistency over interim measures that may be granted, particularly where a party may be tempted to send simultaneous requests for interim measures to the Court or the Court or when the party may pursue the same relief from the tribunal in the anticipation that it does not obtain an interim measure from the Court [19]. In *U&M Mining Zambia Ltd v Konkola Copper Mines Plc*<sup>30</sup>, the English High Court ruled that no second time should be given for a party to request a measure from a tribunal in which he had failed to seek the same interim measure before a court. The application was based on the same evidence and facts as before the tribunal. In this decision, an interim measure was appropriate if there had been new facts following the decision of the Court or new evidence.

#### THE ENFORCEMENT OF INTERIM MEASURES

As noted earlier, Section 13 of the ACA and Article 26 of the Arbitration Rules generally recognize the jurisdiction of arbitrators to order interim measures. This jurisdiction, despite the existence of an arbitration agreement, does not affect the concurrent jurisdiction of the courts to grant interim measures<sup>31</sup>. Unfortunately, however unlike arbitral awards, no instrument or provision governs the recognition or enforcement by the arbitral tribunal of orders of interim measures. Legal commentators agree when they point out that the parties often instinctively comply with interim measures ordered by arbitral tribunals [20, 21].

Arbitral interim measures are not self-executing, while judicial interim measures are directly enforceable and have statutory authority and legislative mandates under arbitral enactment. An arbitral tribunal or a court of competent jurisdiction shall take effective, timely and compulsory interim measures and those measures which serve the purpose of preserving the *status quo*, protecting evidence and preventing malicious transfer of properties. Those measures are commonly applied in international arbitration. The party on whom the interim measure is imposed is generally likely to execute the interim measure as ordered and to perform it as directed. In order to avoid arbitral proceedings with adverse consequences, the party to which an interim measure is enforced is generally likely to carry out the interim measure as ordered and to show deterrence to the arbitral tribunal or tribunal. Under such situations, the introduction of interim measures becomes critical.

The arbitral enforcement mechanisms are usually subdivided into subsections, namely: (a) voluntary compliance, (b) compliance fines, (c) arbitral damages, and (d) Adverse inference [22]. These devices help implement and accept any interim arbitral measures given by the arbitral tribunal. Indeed, these mechanisms suggest that there are

many remedies available to arbitral tribunals to ensure that their orders for interim measures are complied with. It should be remembered, however, that the prospects for any efficacy of these legal instruments remain somewhat uncertain because they are aimed only, as a last resort, at pressuring the recalcitrant party to comply with the orders of the arbitral tribunals and, thus, at achieving conscious compliance. These should not refer to interventions by the courts to which the claimants would have recourse if such steps are not complied with or appear to be unsuccessful [23]. Voluntary compliance with court orders should not be overestimated, since it depends to a huge extent on the intentions of the parties not to adversely affect the arbitration until a decision on the merits has been made. In addition, the availability of meaningful sanctions in the event of non-compliance is the strongest deterrence and guarantees the efficacy of the measure [24]. The interim measures granted by the tribunal cannot therefore be meaningful until the parties involved can obtain its enforcement. The remedies for ensuring compliance with and improving arbitral interim measures which take the form of sanctions imposed by the arbitrators based on either the law or the will of any party or the compliance mechanism of the courts [11].

According to the famous decision in *Channel Tunnel*<sup>32</sup>, the court ruled that as a consequence of non-compliance with the interim measure orders, arbitrators had the right to decide on damages. This is focused on the conclusion that the arbitration agreement is a contract and that all damages are related to the contract. Interim measures have an undeniable contractual significance arising from the power granted by the arbitration agreement by the parties to the arbitrators. In order not to frustrate the smooth resolution of the conflict by arbitration, this contractual obligation is reinforced by the obligation of good faith imposed on all parties to the arbitration. By requiring the recalcitrant party to compensate for any damage caused by the other party as a result of non-compliance with this contractual obligation, as a result of a violation of that contractual obligation, the recalcitrant party shall pay compensation for any damage caused by the other party as a result of non-compliance.

The court has the right to sanction non-compliance in order not to frustrate the smooth resolution of the conflict by arbitration, this contractual obligation is reinforced by the obligation of good faith imposed on all parties to arbitration. By requiring the recalcitrant party to compensate for any damage caused by the other party as a result of non-compliance with this contractual obligation, as a result of a violation of that contractual obligation, the recalcitrant party shall pay compensation for any damage caused by the other party as a result of non-compliance.

The court has the right to sanction non-compliance.<sup>33</sup>. Compliance with the order specifically under the agreement may not necessarily lead to compensation for damages unless the parties' agreement, including the arbitration rules and/or

30 [2013] EWHC 260.

31 Article 26 (3), Arbitration Rules.

32 [1993] AC 334.

33 *Van Uden Maritime BV, trading as Van Uden Africa Line v. Kommanditgesellschaft in Firma Deco-Line and Another* (Case C-391/95) [1999] 2 W.L.R. 1181.

the *lex arbitri* confer such a power on them [25]. In the absence of any damages, the beneficiary could only obtain an award ordering the specific performance of the obligation, which *per se* is incompatible with the urgency of most cases of interim relief. Compensation for damages is not an adequate remedy and is incompatible with the need to protect a party's right against harm which is by definition deemed irreparable. This remedy, however, is not entirely satisfactory for several reasons [24]. In the first instance, the authority of the court to grant or award damages for failure to comply with interim measures is far from definitive and should be assessed on a case-by-case basis with regard to the terms of the arbitration agreement and the arbitration rules, in order to decide if either of them is applicable on that basis. Secondly, non-compliance with sanctions does not generally result in compensation for damage. Finally, even though technically possible, arbitration for damages sustained as a consequence of non-compliance with the arbitrator's order is not, in general, an effective remedy for the defense of the party's right to damages, which is irreparable by default.

Some scholars claim that under the authority of the arbitrators to issue interim measures, the power to rule on damages is implied [26]. Since arbitrators have the power to issue interim measures, they should also have the power to assess the amount of damage resulting from non-compliance to ensure compliance or implementation of these orders<sup>34</sup>. Some circumstances exist where a party that disregards the sanction can refuse to comply with an interim measure imposed by a tribunal, despite the availability of damages for non-compliance, as demonstrated in the common case of *Kastner v Jason*<sup>35</sup>. In this case, according to the English Arbitration Act of 1996, two partners, Mr Ernest Kastner and Mr Marc Jason, agreed to refer their disputes to arbitration under Jewish law. Mr Kastner invested in the business of Marc Jason and then sought to recover his investment before Beth Din by arbitration (Jewish arbitration tribunal or the Federation of Synagogues). The parties had agreed to comply with the orders of the tribunal or any penalties imposed by the tribunal where if the order has not been complied with. Kastner claimed in due process that his investment in Jason's business was due to fraud in 2001, and the arbitral tribunal ruled on the grounds of fraud in favour of Mr. Jason. To restrain the sale of his house in Helmsdale Gardens until he has been given a permit to do so, the arbitral tribunal issued a freezing order against Jackson. In the appeal to the Tribunal by Kastner on 27 February 2002, the court ordered Jason to refrain from taking any steps altering the status quo concerning ownership of the property until permission has been given, according to powers invested in the court by arbitration Act 1996. He then applied to the Land Registry for caution to safeguard the property's interests with the tribunal's approval. The respondent, Jason, agreed to comply with the arbitral order in March. However, on 11 April 2002, Jason entered into a contract of sale and finalized the contract

of sale of the property to Mr. and Mrs. Sherman, in flagrant violation of the direction of the agreement, and moved it to the United States. As he performed his Land Registry search, Mr. Sherman's solicitor inexplicably failed to read the caution. Sherman continued with the purchase on 20 May 2002 in negligence of the caution warning. They paid the full purchase price, and Mr. Jason carried out the transfer of interest. Sherman funded the acquisition partially with a mortgage from HSBC. The balance was taken out after two previous mortgages had been paid off.

Following the accusation of fraud in the property and profit from the sale, the court awarded Kastner quantified damage in the amount of £237,224.50. Subsequently, the purchasers of this property found that their property could not be registered. They brought legal action against Mr Kastner because they were not parties to the arbitration settlement as third parties. Although the arbitrator was empowered to issue orders and to impose penalties for compliance, subject to the powers of the court under Section 39 (4) and Section 48 (5) of the English Arbitration Act, Rix LJ held that it did not have the power to grant attachment orders to secure the disposition of property. The irony, in this situation, is that even though there is a sanction or damage to the claimant, the arbitration process lacks safeguards, and dishonest parties can defraud the system without any adverse effect. Indeed, this adduces that the present jurisprudence on enforcement of interim measures needs more changes globally and the Nigerian Parliament should consider making the necessary changes if Nigeria is to develop as an appropriate venue for arbitration and enforcement.

Where the parties do not willingly comply with an interim measure, the intervention of the courts is required to achieve its judicial approval and compliance<sup>36</sup>. For instance, in *Teradyne Inc v Mostek Corp*<sup>37</sup>, where it was held that a court can grant injunctive relief in an arbitrable dispute pending arbitration. However, it should be noted that just like in numerous jurisdictions, the issue of enforcing arbitral interim measures is not provided for in the federal legislation on arbitration. Even in countries that have made rules on the issue, there is an evident lack of uniformity among countries that have adopted specific rules on the recognition of interim measures.

#### *RESOLVING THE ISSUES AND CHALLENGES TO THE ENFORCEMENT OF INTERIM MEASURES*

Interim measures provided by the courts in aid of arbitration are without any doubt, inherently easier to enforce. They lend themselves to the normal court enforcement mechanics and the compliance force. Aside from pre-emption and court precedent, the Nigerian Federal Legislature, that is the National Assembly, should aim to minimize the amount of court interference in arbitral proceedings because such judicial assistance interferes with the arbitral process and reduces the benefits and attractiveness of arbitration [27]. Court involvement

34 Ibid.

35 [2005] 1 Lloyd's Rep 397.

36 *Teradyne Inc v Mostek Corp*, 797 F. 2d 43, 51 (1st Cir 1986).

37 797 F. 2d 43, 51 (1st Cir 1986).

threatens the confidentiality associated with the arbitral process, reduces the informality and neutrality of the proceedings, and increases the costs and complexity of arbitration [28]. Furthermore, the need for court assistance results in lengthy delays, jurisdictional problems, and the possibility that courts will not order interim measures of protection for fear of interfering with the arbitral process [27].

It is this reluctance on the part of the courts to order temporary relief in favour of arbitration that reinforces the need for the legislature to limit party dependence in the arbitral process on court assistance. Because of the lack of any national laws concerning the power of judges to order interim relief measures in favour of arbitration, there is a division between the decisions of the court about how the court should intervene in the granting of interim measures. For example, the case of *NV Scheep v. MV S. Araz*<sup>38</sup> noted above limits the intervention of the court to grant interim measures only if the subject-matter is in dispute before the court and not the arbitral panel. This is a Supreme Court judgment and in our humble opinion, it erred to take cognizance of the provisions of Section 13 of the ACA and Article 26 of the Arbitration Rules.

Although courts and tribunals have sought to advance the conditions for initiating the application and determine who and what requirements for the grant of a request, both nationally and internationally the rule of law is still unclear. Classified as a beneficial turning point for arbitration in Nigeria, the Nigerian Arbitration and Conciliation Act does not specifically and expressly state who should initiate or initiate an application, what circumstances the tribunal should take into account when considering a request from the parties, and the length of the request, provided that each case is judged on its merits. According to international arbitral rules, such as those of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), International Centre for the Settlement of Investment Disputes (ICSID), and even UNCITRAL, the latest revision does not explicitly answer the question of an interim measure. A provision should be adopted by the Nigerian Arbitration and Conciliation Act that sets out or offers instructions on what application should entail, in other words, the formality of whether it should be presented in writing or addressed orally during the proceedings. Since time is important in business transactions and since interim measures are temporary in nature, it is appropriate to immediately address through legislative when a request should elapse after an arbitral tribunal has ordered interim measures. The courts should be careful to preserve the autonomy of the parties when addressing the above issues with a measure request. In this context, it is true to say that, given the time it can take to make a final judgment about whether or not a request should be taken into consideration, the arbitral proceedings will continue to be interrupted by requests or delays.

The United Nations Convention on the Recognition of Foreign Arbitral Awards, (commonly referred to as "the New York Convention") has been lauded for giving force to the final awards of arbitration tribunals [29]. However, it is unclear whether interim measures are within the purview of the New York Convention [30]. Consequently, interim measures issued by an arbitral tribunal do not necessarily have the same legal force as court orders of a national court. This is problematic because a party may choose to not comply with an interim order issued by a tribunal. Such a situation may force the party moving for interim measures to appeal to the appropriate national court system to enforce the interim measure [23]. However, the courts have treated the enforcement of interim measures in different ways. The disparate degrees to which different national courts support interim measures can lead to unpredictability in the arbitral system.

In re-examining the interim relief provisions under the ACA, the National Assembly should focus on four issues that have been the subject of debate among commentators in the area of international commercial arbitration [27]. These include: (1) the availability of interim relief before the creation of the arbitral tribunal; (2) the availability of *ex parte* interim measures of protection; (3) guidelines for arbitrators to follow in determining whether to order interim relief; and (4) enforcement of interim measures of protection [27].

It can take months for an arbitral tribunal to be established [27]. During this time, it is necessary for there to be procedures in place so that the parties may request interim measures to protect assets and evidence. The provisions of Section 13 of the ACA and Article 26 of the Arbitration Rules do not address the availability of interim relief before the formation of the arbitral tribunal, parties are still forced to turn to the courts to receive interim relief. While the revised Model Law does not offer any new guidance on this issue, some arbitration institutions such as ICC and American Arbitration Association (AAA) have created specific rules to deal with it through the use of "emergency arbitrator" to deal with the issues of interim measures or injunctions<sup>39</sup>.

Commentators have argued that *ex parte* interim measures of protection are necessary for certain circumstances when there is a sense of urgency and surprise is necessary to avoid the possibility of harm to a party [27]. There is, however, an ongoing debate concerning whether the arbitral tribunal should have the power to order such relief. In light of this controversy, parties, arbitrators, and courts need to have clearly defined procedural rules informing them of the availability of *ex parte* interim measures. The ACA does not address this issue at all. The National Assembly can adopt the provisions of Article 17 of the revised Model Law which deals with the power of an arbitral tribunal to award *ex parte* interim measures of relief.

While creating confusion in the courts, the silence of both

38 (2000) 15 NWLR (Pt. 691) 622.

39 AAA International Dispute Resolution Procedures 2007, art. 37; ICC, Rules for a Pre-Arbitral Referee Procedure 1999.



the ACA and the Supreme Court regarding matters of procedure in arbitration has also created an opportunity for states legislature to fill such gaps with their own procedural rules [31, 32]. This opportunity allows states to craft procedural rules that are increasingly receptive to the needs of parties. In doing so, states are also allowed to compete with other states and arbitral institutions for arbitration business. Because States may only mimic the provisions contained in the ACA on such substantive matters due to the doctrine of "covering the field"<sup>40</sup>. States must attempt to differentiate their arbitration legislation from other state arbitration laws or institutional rules by providing procedural rules that are comparatively more receptive to the needs of parties.

One of the most significant issues concerning interim relief in commercial arbitration is that of enforcement. If interim relief is not enforceable, it is meaningless [33]. Most rules of arbitration provide that the arbitral tribunal may order interim relief; however, they do not provide any method for the enforcement of such provisions. Thus, parties are forced to turn to the courts seeking enforcement of the tribunal's order. Practically, parties remain dependent on the courts for enforcement, thereby diminishing the advantages and attractiveness of international commercial arbitration. If the arbitral tribunal were given more power to enforce its orders for interim relief, the need for parties to seek court assistance would be significantly reduced. While the revised Model Law does not guide national legislatures on how to deal with this enforcement issue, the English Arbitration Act of 1996 does provide an example in which the arbitral tribunal has increased power to coerce parties to comply with orders for interim relief. Under Article 41, entitled "Powers of the tribunal in case of party's default," the English Arbitration Act provides that if a party fails to comply with any other kind of peremptory order, then... the tribunal may: (1) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; (2) draw such adverse inferences from the act of non-compliance as the circumstances justify; (3) proceed to an award based on such materials as having been properly provided to it; or (4) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance<sup>41</sup>. This provision can be replicated or improved upon by the National Assembly when reviewing

the ACA and the Arbitration Rules.

## 4. Conclusion

For the efficacy of the arbitration process, interim measures are essential because they have the effect of compelling parties to proceed in a manner that is conducive to the effectiveness of the tribunal, protecting the interests of the parties, avoiding self-help sustaining harmony between the parties and ensuring that a potential final award can be enforced. A party may destroy evidence to challenge an arbitration or transfer assets in expectation of an adverse arbitration award without interim measures. However, by imposing excessive interim measures, the financial burden on the non-moving party may be serious. Accordingly, for both the claimants and defendants in a dispute and the arbitration industry, the principles and guidelines used by an arbitral tribunal in assessing interim measures are highly significant.

Legislators and practitioners should take note of these attempts to address such issues confronting interim relief in international commercial arbitration. As to each of these issues, legislators may consider these rules when re-examining the ACA to create a procedure for commercial arbitration that reduces party reliance on the courts and is more receptive to the needs of parties generally. The legislature should do so to better the arbitral process for those who currently participate in commercial arbitration in Nigeria, while also increasing the likelihood that more businesses will find the state an attractive forum for conducting arbitration business and international commerce. The problems and uncertainties surrounding interim measures should be resolved since they are as relevant as the final award to improve the efficiency of arbitration and meet the needs of businesses and finally to ensure the effectiveness of arbitration. In the meantime, practitioners and parties may take note of the issues that they may confront while participating in commercial arbitration in Nigeria and attempt to address these issues in their client's arbitration agreements.

## References

- [1] Sherwin P and Rennie D, "Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis" (2010) 20 American Review of International Arbitration 317 <<https://arbitrationlaw.com/pdf/interim-relief-under-international-arbitration-rules-and-guidelines-comparative-analysis-aria>> accessed December 4, 2020.
- [2] Lew J, "ICC Commission on International Arbitration" (1988) 91 International Arbitration Bulletin 37.
- [3] Kennett W, *Enforcement of Judgments in Europe* (Oxford University Press 2000).
- [4] Gaillard E and Savage J (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999).
- [5] Cremades B, "The Need for Conservatory and Preliminary Measures" (1999) 27 International Business Law 226.

40 In *A. G. Ogun State & Ors. v A. G. Federation* (1982) NSCC (Vol. 13) 1 at p. 35 lines 18 - 30, His Lordship, KayodeEso, JSC stated thus: "I take the view that when one considers this doctrine, the phrase "covering it the field" means precisely what it says. Where a matter legislated upon is in the concurrent list and the Federal Government has enacted a legislation in respect thereof, where the legislation enacted by the State is inconsistent with the legislation of the Federal Government it is indeed void and of no effect for inconsistency. Where, however, the legislation enacted by the State is the same as the one enacted by the Federal Government, where the two legislations are in *parimateria* I respectfully take the view that the State Legislation is in abeyance and becomes inoperative for the period the Federal Legislation is in force." (Emphasis mine) This view was endorsed and adopted firmly in the case of *AG Abia State v AG Federation* (2002) 6 NWLR (Pt. 763) 264.

41 Section 41 (7), English Arbitration Act of 1996.

- [6] Craig L, Park W and Paulsson J, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications 2000).
- [7] Van der Bend B, Leitjen M and Ynzonides M (eds), *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law* (Kluwer Law International 2009).
- [8] Mohamed S, "Party Autonomy Doctrine Is the Cornerstone of Arbitral Provisional Measures" (2016) 1 International Academic Journal of Law and Society 28 <[http://www.iajournals.org/articles/iajls\\_v1\\_i1\\_28\\_43.pdf](http://www.iajournals.org/articles/iajls_v1_i1_28_43.pdf)> accessed December 3, 2020.
- [9] Yeşilirmak A, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005).
- [10] Collins L, *Provisional and Protective Measures in International Litigation* (M Nijhoff 1992).
- [11] Collins E, "Pre-Tribunal Emergency Relief in International Commercial Arbitration" (2012) 10 Loyola University Chicago International Law Review 105 <<http://lawcommons.luc.edu/lucilr/vol10/iss1/7>> accessed December 4, 2020.
- [12] Livingstone ML, "Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?" (2008) 25 Journal of International Arbitration <<https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/25.5/JOIA2008041>> accessed December 4, 2020.
- [13] Jarvin S, "The Sources and Limits of the Arbitrator's Powers" in JDM Lew (ed), *Contemporary Problems in International Arbitration* (Springer Science+Business Media 1987) [https://link.springer.com/chapter/10.1007%2F978-94-017-1156-2\\_7](https://link.springer.com/chapter/10.1007%2F978-94-017-1156-2_7).
- [14] Moses M, *Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017).
- [15] Born G, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Wolter Kluwer 2016).
- [16] Pryles M, "Limits to Party Autonomy in Arbitral Procedure The Problem Party Autonomy" (2005) <[https://cdn.arbitration-icca.org/s3fs-public/document/media\\_document/media012223895489410limits\\_to\\_party\\_autonomy\\_in\\_international\\_commercial\\_arbitration.pdf](https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012223895489410limits_to_party_autonomy_in_international_commercial_arbitration.pdf)> accessed December 4, 2020.
- [17] Rajveer A, "Parties' Autonomy in International Commercial Arbitration" (2018) 9 International Journal of Scientific & Engineering Research 1204 <https://www.ijser.org/researchpaper/Parties-autonomy-in-international-commercial-arbitration.pdf>.
- [18] Hunter M and Redfern A, "International Commercial Arbitration - Jurisdiction Denied: The Pyramid Collapse" [1986] Journal of Business Law 15.
- [19] Trindade AAC, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)" (2003) 24 Human Rights Journal 162 <https://www.corteidh.or.cr/tablas/r23114.pdf>.
- [20] Aboul-EneinMIM, "Issuing Interim Relief Measures in International Arbitration in the Arab States" [2002] the Journal of World Investment & Trade 77.
- [21] Berger KP, *International Economic Arbitration*. (Kluwer Law And Taxation 1993).
- [22] Heilbron H, *A Practical Guide to International Arbitration in London* (Informa Law From Routledge 2014).
- [23] Born G, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014).
- [24] Poudret J-F and Besson S, *Comparative Law of International Arbitration* (SchulthessMédiasJuridiques 2002).
- [25] Rhoades RVT, Kolkey D and Chernick R, *Practitioner's Handbook on International Arbitration and Mediation* (Juris Net 2007).
- [26] Karrer P, "Interim Measures Issued by Arbitral Tribunals and the Courts – Less Theory, Please" in Albert Jan van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* (Kluwer International 2000).
- [27] Ferguson S, "Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions, and Anticipated Results" (2003) 12 Currents: International Trade Law Journal 55.
- [28] Rubins N, "In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration" (2000) 11 American Review of International Arbitration 307.
- [29] Silberman L, "The New York Convention after Fifty Years: Some Reflections on the Role of National Law" (2014) 38 Georgia Journal of International & Comparative Law 25 <<https://digitalcommons.law.uga.edu/gjicl/vol38/iss1/4>> accessed December 4, 2020.
- [30] Brower C, "What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures under the New York Convention" (1995) 35 Virginia Journal of International Laws 971 <<https://digitalcommons.wayne.edu/lawfrp/303/>> accessed December 4, 2020.
- [31] Akinyeye O and Bello R, "A National Policy on Arbitration in Nigeria" (*OlisaAgbakoba Legal*, February 6, 2020) <<https://oal.law/a-national-policy-on-arbitration-in-nigeria/>> accessed December 4, 2020.
- [32] Hayford S and Palmiter A, "Arbitration Federalism: A State Role in Commercial Arbitration" (2002) 54 Florida Law Review 175 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=298720](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=298720)> accessed December 4, 2020.
- [33] Wang W, "International Arbitration: The Need for Uniform Interim Measures of Relief" (2002) 28 Brooklyn Journal of International Law <<https://brooklynworks.brooklaw.edu/bjil/vol28/iss3/8/>> accessed December 4, 2020.