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PARTY AUTONOMY DOCTRINE IS THE CORNERSTONE OF ARBITRAL PROVISIONAL MEASURES

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Abstract:

International arbitration is based upon the parties 'consent and not surprisingly the arbitration agreement is considered by leading commentators to be the foundation stone of international arbitration. Arbitration is a consensual process based the doctrine of party autonomy. It's a truism of arbitration law that arbitration is a creature of party choice. This feature reinforces the contractual basis of arbitration and is reflected in the vasty majority of international conventions, national laws and institutional laws; therefore party autonomy is considered one of the most doctrines in international arbitration. Since parties agree that all current "compromis" and future "clause compromissoire" disputes should be solved through arbitral proceedings, there is no reason as to why all provisional measures emanating from arbitration agreement should not be granted by a competent arbitration tribunal. It should however, be noted that this is not always the case. Although party autonomy isthe bible in arbitral proceedings, it has limitations.[1] This article examines the role played by doctrine of party autonomy in granting arbitral measures with a view of providing recommendations where there gaps in the law of England. The article will focus on source of jurisdiction and advantages of party autonomy

Introduction:

Party autonomy rule, [2] is based on the assumption that parties to an arbitration agreement are knowledgeable and informed,[3] and they use the doctrine responsibly.[4] As a matter of principle, the expression "*unless otherwise agreed by the parties*," is a frequent occurrence in many arbitral enactments, conventions and treaties or arbitral

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[1] See Lord Diplock, in Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd [1981] Ac 909, where the Court of Appeal held that the English Court has no general supervisory powers over the conduct of arbitration that are more extensive than the powers conferred by the Arbitration. See Gary Born Internationaal Commercial Arbitration (2nd edn, Kluwer Int 2009) 1170-1172. See Emmanuel Gaillard and John Savage (eds), Fourcahard Gaillard and Goldman on International Commercial Arbitration (5th edn, Oxford University Press, 2009) at 85.

[2] See Nigel Blackaby and Constantine Partasides, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration (5th edn, Oxford University Press 2009) at 85. See Olene Perelynska, Party Autonomy v Mandatory Rules in International, available via http://www.sk..ua/en/publications/party-autonomy-vs-mandatory-rules-international, accessed on 21 July 2016. See DAC Report February 1996,

[3] See Tweddale & Tweddale, who refers to party autonomy of the arbitration agreement as being " *the cornerstone of the UNCITRAL Model Law"*

[4] See *Channel Tunnel v Balfour Beatty Construction* [1993] AC 334 at 263.

rules,[5] that gives the parties a great degree of autonomy, universally, as an acceptable principle.[6] The doctrine of party autonomy at times can be implied, where disputes arise.[7] Where there no explicit powers given to the arbitral tribunal to grant provisional measures,[8]it is submitted that such measures be granted on the basis of the implied powers, where the tribunal operates within a territorial boundary of which is marked by *Lexarbitr*i.[9] It should be noted that such powers receive some criticism, since implied powers are seen as common law concept, and that lack of statutory foundations infringes the principle of legality.[10] The author argues that such criticisms appear are baseless on the grounds when parties' confer authority to the tribunal to adjudicate disputes,[11] the tribunal has extensive authority under the party autonomy principle *"voluntapartiumfacit*."[12] This principle derives from the concept that the intent of the parties shall be respected and enforceable, [13] all arbitration, party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.[14] The party autonomy doctrine allows parties to choose the applicable law, the *" lex arbitri*,"[15] the law of the substance,[16] the composition of the tribunal,[17] and the arbitrability of a dispute.[18]

Sources of Party Autonomy:

There are no clear explicitly expressed provisions in the current English Arbitration Act 1996 or international law and conventions on arbitration that defines what party autonomy. The definition has become a matter of theory rather than practice. However

[5] See see Julian Lew, loukas Mistelis and Stefan Kroll, Cooperative International Commercial Arbitration (Kluwer International 2003 at 18. See Jan Paulsson, International Commercial Arbitration; in John Tackberry, Arthur Marriot QC and Ronald Bernstein, Bernstein's Handbook of Arbitration and Dispute Resolution Practice (4th edn, Sweet & Maxwell 2003 at 335.

[6] See Steel J in *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance* [2000] 2 Lloyds's Rep 68, where it was held that the arbitral tribunal was better to hear evidence from two Romanian academics, due to party autonomy doctrine.

[7] See Charles Construnction v Derderian, 586 N.E 2d 992 (Mass 1992), where the Circuit Court in USA, held that an arbitral tribunal has an implied authority to grant security for costs. See David Caron, Interim Measures of Protection; Theory and Practice in Light of the Iran United States Claims Tribunal (Barkeley Law UC 1986), see Craig Park and Paulsson, International Chamber of Commerce Arbitration (3rd edn , Ocean Publications 2000), the Powers of the arbitrator to issue Procedural Orders including Interim Measures of Protection, and the obligation of the parties' to abide to such orders," 10 (1) ICC Int'l Bull 65-66 (1999).

[8] *See Jivraj v Hawshwani* [2011] UKSC 40, where it was held that arbitrators have the discretion to settle disputes based on the principle of implied party autonomy.

[9] See LCIA Rules, Article 25.1, see European Convention, which provides a Uniform Law on Arbitration 1966 Article 4(2).

[10] See Mackinnon J in Norse *Atlas Insurance Company Ltd v London General Insurance Co Ltd* [1927] 1 Lloyd's Rep 104 at 107, where it was practical for the arbitrators to determine issues for a business context under party autonomy. [11] See First options of Chicago Inc v Kaplan 514 US 938 (USACt) (1995).

[12] See English Arbitration Act 1996 S.1 (b).

[13] See ChatterJee, The Reality of the Party Autonomy Rules in International Arbitration ;(2003) Journal of International Arbitration 20(6) 539-560.

[14] See ICC Rules Article 23 (1), ACICA Rules Article 81.

[15] See An English Judge define Lex Arbitri as a body of rules which sets standards external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration.

[1616] See Model Law Article 28 (1) UNCITRAL Article 35(1) Hunter par 3.98.

[17] See Emilia Onyema, Selection of Arbitration in International Commercial Arbitration (2005) International Law Review 8(2) 45-54 at 46. See ICC Rules Article 8.3-8.4, see ICDR Rules Article 6. See M Scott Dohaney, The Independency and Neutrality of Arbitrators (1992) 9J Int'l Arb 31.

[18] See Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc,473 US 614 105 ct 3346 (1985), see Eco Swiss China Time Ltd [1981] Ac 909,where Court of Appeal held that English Court has no general supervisory powers over the conduct of arbitration that are more extensive than the powers conferred by Arbitration Acts.

scholars in the field of arbitration for example; Rene David have defined party autonomy as

" a device whereby the settlement of a question, which is of interest for two or more persons is entrusted to one or more other persons the arbitrators who derive their power from a private agreement, not from the authorities of a state, and who are proceeded and decided the case on the basis of such agreement."[19]

Similarly, Vein Albert Jan den Berg defines party autonomy as "the *resolution of a dispute between two or more parties by a third party person who derives his powers from the agreement of the parties' and whose decision is binding upon them."*[20]

Hunter, *defines it in the following terms" it is a principle that has been endorsed not only in national laws abut also by international arbitration institutions and organisation*."[21]

Tweddale & Tweddale said that " the autonomy of the arbitration agreement is considered as being one of the cornerstones of the UNCITRAL[22]."

One of the problems in English Jurisprudence is the lack of clear definition of this termof art, In order to avoid ambiguity in the application of party autonomy doctrine, it essential for the current Arbitration Act 1996, to provide clarity on this matter. The author recommends that international conventions for example; New York, LCIA, Model Law should adopt a clear procedure, in order to harmonise arbitration jurisdiction with regards to arbitral provisional measures. It should however be noted that in order to provide a wide scope for party autonomy that the legislators did not limit its scope and application to arbitral disputes or provisional measures.

Case Law and Party Autonomy:

Case law supports the notion that party autonomy is the cardinal element of arbitration,[23] and that the arbitral tribunal has the power to grant provisional measures due to the arbitration agreement or clause in the agreement.[24] The doctrine of party autonomy was first brought to attention by the municipal courts in United States of America, in the famous case *of McCreary Tire & Rubber Co v CEAT SPA,*[25] where the dispute arose which related to a breach of the exclusive distribution agreement subjectto arbitration agreement between McCreary, a Pennsylvanian corporation, and CEAT, an Italian, under ICC Rules in Brussels. Mc Creary attempted to frustrate the arbitration

[19] See Lew, J Applicable Law in International Commercial Arbitration (New York;Ocean Sijholf, 1978) 11.
[20] Ibid.
[21] See Redfern Hunter, Comparative Law of International Arbitration at 315.
[22] Tweddale & Tweddale at 40.
[23] See Megaw LJ in Dalmia Diary Industries Ltd v National Bank of Pakistan [1978] 2 Lloyd's Rep 223 at 83, where he said that " *we see no reason why a matter of construction of the words used; the courts should try to cut down the width of the intended meaning. The meaning is to provide a wide scope to arbitral tribunal to rule on its jurisdiction."*
[24] See *Products Inc v Onus Shipping Co Ltd Un Reported, see Lloyd v Guilbert* [1865] 6 B at 101, see George Jessel Mr in *Printing and Numerical Registering Co v Sampson* [1875] LQ 462.
[25] 501 F2d 1032 (3rd Cir 1974).

agreement and initiated a suit. The Court of Appeal for the Third Circuit in Philadelphia was called to rule on the compatibility of the pre-trial attachment under New York Convention.[26] The court referred the parties to arbitration rather than stay the trial of the action. The court in support of party autonomy saw that allowing a stay would bypass the agreed-upon method of settling disputes and such a bypass is prohibited bythe New York Convention forbids the Courts of the contracting states from entering a suit which violates an agreement to arbitrate.[27] The Court of Appeal provided that the obvious purpose of the enactment was to permit the removal of all cases falling withinthe terms of the treaty, in order to prevent the vagaries of state law from impending its full implementation. Permitting a continued resort to foreign attachment in breach of the agreement was held to be inconsistent with the purpose.

This was further developed in England by House of Lords in the famous case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*,[28] where Lord Mustill critically analysed the doctrine of party autonomy in depth.[29] The channel Tunnel rulingin support of party autonomy has been advanced in the recent ruling by Kagan J of the Supreme Court , in New Jersey, the *Oxford Health Plans LLC v Sutter*.[30] The court in support of party autonomy referred the case to arbitration due to arbitration clause in the agreement. In other words under USA jurisdiction,[31] it has been adduced in many cases that the courts are willing and will not allow any suit against arbitration agreement. In USA under American Arbitration Association, a person seeking provisional measures from the court bears a heavy burden, just showing that an arbitrator made an error or even serious error, because the parties bargained for arbitration construction of their agreement, and an arbitration decision stands regardlessof the court's view of its merits.[32]

Party Autonomy under International Conventions and Rules:

The doctrine of party autonomy is given the utmost respect internationally under many arbitral conventions and rules. Since England is a centre for International arbitration itsof great importance to consider the most prominent arbitral rules and conventions as will be discussed below:

The London Court of International arbitration provides that " *a tribunal shall have jurisdiction to rule on their jurisdiction including any objection to the initial or continuing existence, validity or effectiveness of the arbitration." [33]* Further, LCIA provides that *" the tribunal shall have the power, unless agreed by the parties in*

[26] See New York Convention Article 11 (3).
[27] See McCreary Tire at par 90-91.
[28] [1992] 334 HL.
[29] See Par 4 of the Clause 67 provide that " *subject to certain provisions as to notice, all disputes or differences. Shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed under such rules*."
[30] See *Oxford Health Plans PLLC v John Ivan Sutter*[2013] 675 F.3d 215 No. 12-135 (US June 10 2013) at 60, 249.
[31] See Stolt-Niesan SA v Animal Feeds Int'l Corp 559 US 662.
[32] See *Eastern Associated Corp v Mine Workers* 531 US 57, 62.

[33] See English Arbitration Act 1996 Article 23.1.

writing, on the application of any party to order on provisional basis, subject to final determination in an award, any relief which the arbitral tribunal have the power to grant in an award, including a provisional order for the payment of money or the disposition of property as between parties."[34]

New York Convention provides that " *The Court of contracting state, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being formed."*[35]

UNCITRAL Rules states that the tribunal may at a party's request grant provisional measures. In addition, in 2006 UNCITRAL Model Law decided to broaden Article 17,[36] and 16 (1) where it provides that *" the arbitral tribunal may rule on its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of the contract shall be treated as an agreement independent of other terns of the contract. A decisionby the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*."[37]

Aron Broches commented on the Model Law, that "separability of the arbitration clause is intended to have the effect that if an arbitrator who has been validly appointedand who stays within the limits of the jurisdiction conferred upon him by the arbitration clause concluded that the contract in which the arbitration clause is contained is invalid, he does not thereby lose his jurisdiction[38]." It should be noted that Article 17 of the 2006 version of the Model Law, introduced a preliminary order procedure which allows ex parte orders as one request alongside interim measures, thereby essentially directing the respondent not to frustrate the purpose of interim measures.[39]

Article 28 of the Model Law provides that: *" the arbitral tribunal shall decide the disputes in accordance with such rules of law as are chosen by the parties' applicableto the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law that state and not to its conflict of laws rules."* This is supported by other countries for example; USA,[40] Sweden,[41] French.[42]

[34] LCIA Rules Article 25, available at http://www.Icia-arbitration.com, accessed 25 January 2016.

[35] The New York Convention Article 11 (3).
[36] See Model Law Article 17 (1) (2) (a)-(d).
[37] Ibid Model Law Article 16 (1).
[38] Aron Broches, Commentary on the UNCITRAL Model Law, International Council for Commercial Arbitration, Handbook on Commercial Arbitration (supplement 11 of January 1990) at 74-75.
[39] See *First Options of Chicago Inc v Kaplan* 514 US 938 (US Cir 1995).[40]
See American Arbitration Association Rules Article 21 (1) and 27 (7). [41]
See Swedish Arbitration Act S.25 (4).

[42] See French Commercial Code Article 1494 (2).

The ICC Rules provides that " *unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the tribunal may, at the request of a party, order any interim measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measures shall take the form of an order, giving reason, or an award as the arbitral tribunal considers appropriate*."[43]

ICC Rules further provides that *" where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effecton the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement."*[44] International arbitral rules, conventions and arbitral enactments are in support of party autonomy as the main source for granting provisional measures. It should be noted that in England, the power of the tribunal under party autonomy provided under S.39 of the English Arbitration Act 1996, is limited. Although S.39 limits the autonomy of the parties, S.30 of the Act provides unlimited powers for the tribunal to rule on its jurisdiction. This means that English tribunal may use S.39 to grant provisional measures, subject to limitation of draconian freezing orders and anti-suit injunction.[45]

Theories Advanced in Support of the Doctrine of Party Autonomy:

Party autonomy establishes a contract between the disputing parties to an arbitration agreement. Since arbitration is bilateral contract, one party to the arbitration agreement makes an offer with the legal intentions to be bound by the other party. An arbitration agreement is owned by the parties' as a ship is owned by a ship owner, in command of the captain (arbitrator), and subject to dismissal by the disputants.[46] Theories have been advanced in support of the doctrine of party autonomy to adduce that the powers of the tribunal to grant provisional measures result from the parties' acquiescence or the will of the parties as expressed in the arbitration agreement.[47]

Contractual Theory:

The proponents of this theory argue that party autonomy as evidenced in the arbitral agreement is the essence of arbitration.[48] Party autonomy is a force of the arbitration agreement,[49] which has no state authorisation. [50] Since the arbitration agreement is created through the will and consent of the parties', it provides authority to the arbitral tribunal to grant provisional measures. [51] According to the contractual theory, an arbitrator is an agent of both parties, and therefore, what is done by him has to be

[43] See ICC Rules Article 28 (2012 Version). See ICDR, AAA, ACICA.
[44] Ibid Article 16 (1).
[45] See West Tankers [1993] UKHL.
[46] See English arbitration Act (EAA) 1996 S. 7 and 8.
[47] *See Charles Construction Co v Derderian* 586 N.E 2dd 992.
[48] See Nygh Peter, Autonomy in International Contracts (Clarendon Press Oxford 1999) at 1.
[49] See New York Convention Article II (1), which provides that a dispute must rise in respect of a defined legal relationship.
[50] See *Mitsubishi Motors Corp v Sole Chsler- Plymouth Inc* 473 614 (1985) at 433-38.
[51] See UNCITRAL Model Law Article 26 (1) and (2).

regarded as the will expressed by the parties.[52] Contractual theory is rooted from the parties and not from the public authority. Contractual theory, in other words provides that the state has nothing to do with arbitral proceedings conducted in its territory, since the formation of the tribunal and procedures is all done in accordance with the arbitral agreement between the disputing parties.[53] It may be argued that parties exchange promises with legal intentions to be bound to the performance of those promises.[54] Thus parties' to arbitration perform under a contractual obligation that emanates from the doctrine of party autonomy. The whole arbitration process commences with the existence of the arbitration agreement, which confirms the contractual nature to arbitrate future disputes.[55]

Contractual theory is supported by many writers for example; Francis Kellor said that *" arbitration is wholly voluntary in character. The contract of which the arbitrationclause is a part is a voluntary agreement. No law requires the parties' to make suchcontract, nor does it give one party power to impose it on another. When suchagreement is made part of the principal contract, the parties voluntarily foregoestablished rights in favour of what they deem to be the greater advantage ofarbitration."*[56]

Lord Diplock said that " *the arbitration constitutes a self contained contract collateralor ancillary to the ship building agreement itself*."[57]

FourCchard, Gillard and Goldman express the view that *" a contract does necessarily exist between the parties and the arbitrators; the contract is bi-lateral and creates rights and obligations for both the arbitrators and the parties. However, arbitration is administered by an arbitral institution, the contractual relationship becomes triangular*."[58]

Mustill and Boyd take a centrally view, where he argues that " *to proceed by finding a contract and then applying to it the ordinary principles of the law of contract will not produce a reliable answer unless a contract really exists to be found. Even in the caseof a massive reference, employing a professional arbitrator for substantial remuneration, we doubt whether a businessman would, if he stopped to think, conceded that he was making a contract when appointing the arbitrator. Such appointment is not like appointing an accountant or lawyer. Indeed it is not like anything else at all. We hope that courts will recognise this, and will not try to force the relationship between the arbitrator and the party into uncongenial theoretical frame work, but will proceed*

[52] See David , Arbitration in International Trade (Deventer , The Netherlands: Kluwer Law & Taxation, (1985) at 139. [53] See Donaldson Commercial Court Committee Report on Arbitration 1978, par 16. See Megaw J in *Oriacia v Espaola de Segurors v Belfort MassEtc* [1962] 2 Lloyd's Rep 257.
[54] See *Channel Tunnel v Balfour* [1993] HL.
[55] See *Fiona Trust Holdings Corp & Others v Privalov & Others* [2008] 1 Lloyd's Rep 254 at 256.
[56] See Francis Kellor, Arbitration in Action, Quoted by Morris Stone in " A paradox in Theory of Commercial Arbitration (1996) 21 Arbitral Journal.
[57] See Lord Diplock in *Bremer Vulkan v South India* [1981] 1 ALL ER Par 289 at 297.
[58] See Gailard E and Savage J (edns) Fourchard Gailard Goldman on International Commercial Arbitration { Kluwer Law International 1999) at 601-602.

directly to a consideration of what rights and duties ought, in the public interest, to be regarded as attaching to the status of arbitrator.[59]

The English courts,[60] however, appear to disagree with Mustil and Boyd's view,[61] for example Holbhouse J said that " it is the arbitration contract that arbitrators become parties' to by accepting appointments under it. All parties to the arbitration as matter of contract bound by the terms of the arbitration contract."[62]

Although the contractual theory is a cornerstone of arbitral power to grant provisional measures it is however, subject to criticism. First the maximum freedom of contract is doubted even it is accepted that the existence of arbitration is derived from the express intentions of the parties.[63] Professor David explains that " *the reason why arbitration is considered as institution of the law of contract is probably not that such a view is regarded as having a sounder theoretical foundantion,but that it is considered more likely to further the development of the practice of arbitration. If arbitration is classified within the domain of law of contract, then it is though that the parties will enjoy a maximum freedom in the matter Whether such a consequence actually occurs in the contractual thesis not however clear."*[64]

The author argues that an arbitrator is not an agent as the contractual theory states. The duty of an arbitrator, like that of a judge, is to give the parties a fair hearing and render a decision which may or may not be against both the parties. Conversely, an agent is bound to his principal. The agent, of course is prohibited from being a judge in his own cause, therefore he cannot empower his agent to do the same, besides an arbitrator is immune from liability to the parties with respect to defaults committed by him in his capacity as arbitrator.[65] The author further argues that the criticisms against the contractual theory in support of party autonomy need some critical analysis. The practicability of an arbitral tribunal is like that of a judge, since the arbitrator cats impartially in arbitral proceedings, a principle that any national court practices. The role of the arbitrator in a practical context is similar to that of an agent whereby he performs his duties under the doctrine of party autonomy which manifests the intentions of the parties. The contractual theory manifests the legal relationship between the disputing parties and the arbitrators.[66] Since the disputing parties delegate the power to grant interim measures to the arbitral agreement, and such terms cannot be derogated

[59] Mustill & Boyd, Commercial Arbitration (2nd edn 1989(at 223.
[60] See Westacre Investiments Inc v Jugoimport SPdr Holdings Co Ltd and Others [2000] Qb 288, see Hubco v Water and Power Development Authority (WAPDA) (2000), Vol 16 at 439.
[61] See Mr Justice Philip Comments of the Court of Appeal to *Boyd and Mustil v Hyundai Heavy Industries Co Ltd* [1991] Lloyd's Rep 524.
[62] See
[63] See Mnn. The Theoretical Approach towards the Law governing Contracts between states and private person, XI Rev Belge (1975) at 562-563.
[64] See David R Arbitration International Trade 1985) at 113.
[65] See under the principle of agency, an agent is liable for any injury resulting from negligence or non-execution of agency, or from an act without or in excess of actual authority.
[66] See *At & Technologies Inc v Communication Workers of America* (475, US at 457-649), where it was held that an arbitral tribunal has a contractual obligation to provide interim measures.

from without consent of the parties, there is a duty of compliance with the decisions of the arbitral tribunal in a bona fide cooperation.[67]

Jurisdiction Theory:

Rubellin Devich formulated the judicial theory in 1965. Courts in most jurisdictions were still hostile to arbitration. There was no clear demarcation between the tribunal and judicial courts.[68] The jurisdictional theory highlights the dominance and control exercised by the sovereign states in regulating arbitral proceedings within its territorial jurisdiction through national laws. [69] This theory is based on the premise that an arbitrators performs a judicial function as an alternative (through private) judge as permitted under national and international conventions (which the state has implemented) of the particular sovereign state. It thus emphasizes the fact that international arbitration references cannot take place in a territorial vacuum, without the permission of the state, and must therefore be subject to the law of a particular state.It has been argued that party autonomy is derived from the state not the parties' to the arbitral agreement. Hence the power to grant interim measures, is not similar but they perform the same function, thus the granting of provisional measures is impliedly or expressly provided by the state, since an award in the form of a provisional measure iscomparable to the judgement rendered by the state in that it is not self- executing and if not voluntarily performed. The winning party has the power to apply to the estate for enforcement in the same way as an ordinary judgement. [70]

Although jurisdiction theory is well accepted, it still has some criticisms. The argument that the tribunal has the power like that of a judge is not true, since the arbitrator has the power to modify the arbitration agreement between the parties,[71] while a judge just applies the law and enforces the agreement. The reason why the arbitratos has such power it is because of the party autonomy doctrine, which is the main characteristic feature of arbitration proceedings. In other words the duty of the tribunal is to respectthe freedom of the parties by doing what the parties stipulated, rather than what is stipulated by the government regulation. Hunter rightly concluded that international arbitration is a hybrid, explaining that it begins as a private agreement and continues byway of private in which the wishes of the parties are of great importance.[72]

Secondly, the interim measure rendered is provisional by nature; it has no similarity toa court judgement. The tribunal seeks support from courts where it lacks jurisdiction, for example; to force third parties to give evidence in arbitral proceedings or

[67] See *Bulfracht Cyprus V Boneset Co Ltd* [2002] EWHC 2292.
[68] See Dezalay & Garathty, Transnational Legal Order, Chicago University Press 1996.
[69] See Emilia Onyema, International Commercial Arbitration and Arbitrators, Contract (Rutledge) Research in International Commercial Law (2010) at 33-36.
[70] See Lew, Applicable Law in International Commercial Arbitration; A Study in Commercial Arbitration Awards, New York, Ocean 1978 at 68. See comments of Hong Lin YU, The Explore the Void- An Evolution of Arbitration Theories Part ! International Arbitration Law Review Vol.7 at 435.
[71] See UNCITRAAL Model Law Article 17 (d)
[72] Hunter , International Commercial Arbitration, 146 at par 1-16.

enforcement.[73] The effectiveness of this theory depends on how the state strikes a balance between the state's power to control and the autonomy of the parties in arbitral proceedings.[74]

The Theory of Kompetenz-Komptenz:

This theory is derived from Germany Federal Court, which means that parties to arbitration agreement[75] vest their power to the arbitral tribunal.[76] The main essential features of this theory are as follows: the arbitral tribunal has the power to rule on its jurisdiction,[77] and decide on its competence.[78] The demands of convenience in arbitral proceedings are satisfied, and the requirements of logic are asserted.[79] In order for the tribunal to grant interim measures, under this theory, the tribunal has to prove that thereis no rebuttable presumption that such jurisdiction was conferred by the will of the parties when they entered into an arbitration agreement.[80] There is a broad international consensus that arbitral tribunal have the competence to grant interim awards.[81] As a practical matter, [82] tribunals routinely propose and make decisions concerning jurisdictional matters for example granting provisional measures.[83] Since arbitration agreement is not impeached in these circumstances,[84] and because the arbitrators are only considering the merits of the parties underlying the contract, they are in the best position to grant provisional or interim measures.[85] Accordingly to this theory, the tribunal has the power to grant provisional measures within its competence,[86] without having referring to national courts,[87] when a party challenges the jurisdiction,[88] on the grounds that arbitrators are judges within their jurisdiction due to party autonomy doctrine.[89] Therefore it is not proportionate to impeach arbitral jurisdictional powers, since party autonomy ousts the court jurisdiction in arbitral matters.[90] Arbitrators are

[73] See Polish Arbitration Act 2005 Article 1160-61.
[74] See Polish Arbitration Act 2005 Article 1666.
[75] See Model Law Article 16.
[76] See Germany adopts the UNCITRAL Model Law, Int'l Arb Rev 122 (1988).
[77] seeFan Kun, Arbitration in China (Hart, Oxford and Ragon 2013 at 54.
[78] See English Arbitration Act 1996 S.30, *see SNE v Joc Oil Case USSR Arbitral Award* 91990), XVBK Comm Arb 31.
[79] See DAC Report on Arbitration Bill 1996 Chaired by Savile LJ at 138.
[80] See *ELF Aquitqine v Nioc* reported in Yearbook Comm Arb (1886) at 101 -102., where it was held *that the rationaleof the principle of arbitrators' competence over competence is widely recognised to establish a system of law providing enterprises engaged in activities in other countries under contract with the government of that country or institutions or company for independency of the tribunal..."*
[81] See Jalil Komptenz, Recent USA and UK Development, 13 I;int Arb No.4 Dec 1996 at 169-178.
[82] See William Park, Arbitration International Business Disputes; Studies in Law and Practice (Oxford University Press 2006 at 210.
[83] See *Fiona Trust & Holdings Privalov* [2007] UK 40 at 35.
[84] See Steyn LJ, Engalnd Response to UNCITRAL Model Law (1994) 10 Arbitration International.
[85] See Emilia Onyema, International Commercial Arbitration and the Arbitral Proceedings (Routldge) at 34, where he said that" *jurisdiction powers are to be exercised by the arbitrators in arbitral proceedings and that modern arbitral laws give the disputing parties' and the arbitrators a wide discretion over their conduct and procedure of the arbitral reference*."
[86] See *Heyman v Darwins Ltd* [1942] AC 356.
[87] See *Green Tea financial Corp v Bazzle* 539 US 444 (US Ct 2003) at 452-53., where it was held that the tribunal should be the best to grant interim measures.
[88] See *Co Ltd v Gosport Marina* 2002 Un reported, where Richard Seymour QC held that it would be the tribunal to rule on its jurisdiction in support of party autonomy.
[89] Germany Civil Code S.1031 and 1040.
[90] See Gary Born, International Commercial Arbitration Vol.1 (2nd edn Kluwer International 2009) 852, where he argues that all arbitral proceedings should be refereed to tribunal.

endowed with powers to decide on their jurisdiction, and thus if the parties agree that the tribunal will deal with interim measures, then courts will respect the contract and autonomy of the parties,[91] provided that that the arbitral power is exercised in good faith, and the interests of the parties are safe guarded. [92]

The Doctrine of Separability:

The principle of separability treats the arbitration clause as an autonomous agreement[93] that survives the invalidity or termination of the underlying contract,[94] and requires argument in jurisdiction challenges to be addressed to facts of law relevant only to the validity of the clause.[95] The principle enables the tribunal to render a valid award evenif the underlying contract is invalid.[96] The tribunal has the jurisdiction to grant final awards which are more powerful than court decisions. The granting of such interim measures is not a matter of contention. The doctrine of separability is now part of the universal consensus[97] among arbitration practitioners and most legal systems[98] of the world as well as international conventions and rules.[99] Separability is severable from the parties related to the contract.[100] The separability affects the relationship between the arbitration clause and the underlying contract.[101] The separability doctrine can only be denied where the party who signed the arbitration agreement lacked the capacity to contract, and then clearly this incapacity affects the arbitration agreement contained therein.[102] The separability doctrine can only be denied where the party who signed the agreement lacked capacity to contract and then clearly this incapacity affects the arbitration agreement.[103] The author submits that separability doctrine is a contractual obligation, where by granting of interim measures is one of the terms of the contractual obligation in this respect, theoretical consistency is compromised in order to accommodate party autonomy.

[91] See Loukas and Julian in their book, Pervasive Problems in International arbitration [2006] Kluwer International, state since arbitrators are frequently drawn from the legal the legal as well as business community, they are the best to grant provisional measures at 21.
[92] See English Arbitration Act 1996 S.30.
[93] See Adam Samuel, Separability of Arbitration Clauses and Administration of Justice, available at http://www.adamsamuel.com/pdf/seprabi, accessed on 12 March 2016.
[94] See English Arbitration Act S.7.
[95] See Macmillan LJ in *Heyman v Darwins Ltd [*1942] Ac 356.
[96] See *Harbour IAssurance Co v Kansa General International Co Ltd* [1993] QB 701, where Hoffman LJ, at 469 in the Court of Appeal confirmed that despite an underlying contract being void for illegality, an arbitration within the contract was separate and survived the voided contract.
[97] See European Convention Article I (2) (a).
[98] See Justice *Korn Fodest in Menisci v Mahieux*, Paris Court of Appeal, 13 Dec 104 j Droit Int'l (Clunet) (1977) 106.
[99] See Geneva Protocol and Geneva Convention 1927 Article IV (I).
[100] See Mr Justice Clarke in *ABB Lunus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24.
[101] See Gary Born, International Commercial Arbitration (Kluwer International,2009) at 317., see Stewart Annual Review of English Judicail Decision onArbitration 2002 6(6) International Arbitration Review (2003) at 220. See Model Law Article 16..
[102] Hong Kong Case *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* (1992) XVII YBK Comm 289- 304, where the High Court of Hong Kong held that the doctrine of separability is broad enough to include contracts which are subject to challenge of initial validity.
[103] Ibid.

Limitations of Party Autonomy:

Although party autonomy accepts the view that parties' are free to determine the proceedings, nevertheless, the freedom of the parties to agree on the rules of procedureis subject to necessary precautions in the interest of the fairness and equilibrium of the arbitration process.[104] There is a potential conflict between the tribunal and the courts, under the party autonomy doctrine**.**[105] The situation could arise where parties have agreed a procedure, but then find it unsuitable. This raises a conflict between the mandatory powers of the tribunal under S.31 (b) and power of the parties under S.33 (1) of the Arbitration Act 1996. This may even be escalated by sections 40 (1) and (2) (a), which provides that parties, must comply with orders given by the tribunals. As arbitration is a consensual process, party autonomy should prevail where there is conflict between the parties' and the arbitrators, and this argument is supported by DAC.[106] I is worth considering how a tribunal might or should react in a situation in which the parties' have agreed on a procedure that the tribunal sees as a breach of its duty.[107] If the parties have agreed before appointing the arbitral tribunal, the arbitrator should write to the parties expressing reservations about the procedure. If on the other hand the procedure is agreed after appointment of the tribunal, the tribunal may resign and the parties may have to pay the fees and expenses of the arbitral tribunal. Moreover, the tribunal may refuse to follow the procedure agreed by the parties' who may then seek to remove the arbitrators.[108] Since S.33 (1) is mandatory, any procedure to be adopted by the tribunal which falls short of the principles set out is void.[109]

The Arbitration Act 1996 provides duties to the parties and tribunal. The Arbitration Act requires the tribunal to act fairly and impartially between the parties, and give eachparty a reasonable opportunity to present the case. In addition, the Act requires the tribunal to adopt the procedure appropriate to the circumstances of each individual case, and void unnecessary delay and expense in the resolution of the dispute. It should be emphasised that the Act refers to a party having a "*reasonable opportunity*" to present their case instead of a full opportunity as referred to in some jurisdictions. The word "reasonable" is possibly chosen deliberately to under the approach of the legislation. Itshould be noted that the English law has not followed the Model Law on authorisation of the tribunal under party autonomy to decide " *exaequoet bono* or as "*amicable compositeur*."

Party autonomy is also limited to on the grounds of removing an arbitrator. It is worth noting that a party to the arbitration who is aware of some irregularity during the arbitration proceedings will lose the right to challenge any subject matter. The Act

[104] See DAC Report 1996, which provides that parties should be free to agree on how their disputes are solved, subject only to such safeguards as necessary in the public interest.
[105] See EAA 1996 S.33 (9), provides that it shall be for the tribunal to decide all procedural and evidential matters subject to the rights of the parties to agree any matter.
[106] DAC Report 1996 Clause 33.
[107] EAA 1996 S33 (1).
[108] Ibid S.24.
[109] Ibid S.33 (1).

provides that the arbitrator has immunity from anything done or omitted in thedischarge of their functions as arbitrator, unless proven to be in bad faith. Robert Merkin comments that widely-drawn immunity clause in the Act provides flexibility and freedom to the arbitrator in handling disputes. The Act undermines the party autonomy when it excludes liability of the arbitrator for any failings in the discharge ofits function or a failure to comply with the arbitration agreement of party autonomy.

The Act under S.33 provides that arbitrators must be fair and impartial and must give each party a reasonable opportunity to present their case. Otherwise it would prima facie constitute a serious irregularity and be subject to challenge. This means that courtshave to determine such challenges, where the tribunal and party autonomy cannot handle the situation, since the Act provides for minimum interference by the national courts. This means that parties choose arbitration under party autonomy rather than choosing the courts to solve their disputes must be respected.

Another important limitation is the choice of law by the parties. The parties' freedom to agree on the arbitration regime of their choice and to choose the procedure to be followed is subject to some limitations. There are situations where it may be appropriate for the tribunal to select and apply a different law from the chosen by the parties. The effect of national mandatory rules is complicated. Mandatory rules limit the will of the parties and must be applied to certain situations. National courts usually apply their mandatory laws without regard to the will of the parties. In the event of any conflict between the party autonomy principle and the mandatory rules of jurisdiction, the latter prevail.

4. Reform of Party Autonomy:

Although the English arbitration section that Arbitration act 1996 has improved the standard of arbitral proceedings internationality and made London the best venue, the author believes that there is still some need for reform with regard to the doctrine of party autonomy, and that such reform will enhance arbitral proceedings and restrict the court intervention. There is a need to widen the scope of the arbitral tribunal under party autonomy to grant more interim measures since S.39 is too narrow, as it only provides interim measure for payment of money or disposition of property or an interim paymenton account of the costs of the arbitration. The Act should adopt the French model since it provides wide scope of party autonomy in regards to granting of provisional measures, since some measures are granted by courts, for example attachment orders in public interest. There is no clear definition, in the Act that defines what public interestis so this calls in the court to monopolise the arbitral proceedings under their mischief interpretation. The author recommends that arbitral proceedings should be set in a way that it's free from court intervention right from the commencement of arbitral proceedings.

The role of courts should be only supportive not interventionist. A total adoption of the Model Law which provides independence of tribunal and the arbitrators, in the end it will limit the application of S.44, which provides that the court has the same power like the tribunal in arbitral proceedings**.** The parties should be able to draft their procedures under the principle of party autonomy; however, the Act does not any express provisions for the parties to draft their terms and procedures. At times there is difficult maintaining the two legal systems, as they have procedural differences between the methods of proceedings. The author recommends that parties , when drafting an arbitration agreement, should seek professional advice from experienced and knowledgeable experts in the forum's law or that of any enforcing state concerning any limitations to party autonomy, particularly that of public policy.

Conclusion:

What the judiciary and the Arbitration Act 1996 should aim to is to achieve a system that is international acceptable and this means final awards would only be paramount if provisional measures were given legal effect. At the moment the law is still ambiguous in regards to arbitral provisional measures. Courts should avoid intervention in arbitral proceedings at any time, in order to comply with the Model law which ignited the enactment of the Arbitration Act 1996, which provides" *that in all matters governed by this law, no court shall intervene except where so provided in this law."*[110] The parties under party autonomy cannot agree on anything that can affect the third parties directly, for example a tribunal cannot compel third parties to attend a hearing as a witness, even if the parties to the contract have conferred such power to the tribunal; hence assistance from courts. Courts should only be restricted for the benefit of the arbitral proceedings and not as a jurisdiction to intervene; this can be demonstrated in *Mitsubish Soler Chrysler Plymouth*,[111] where the USA Supreme Court allowed a dispute concerning a supposed violation of anti-trust laws to be settled by the tribunal. Reverting to jurisdiction and party autonomy doctrine, it is pertinent to appoint to point that this rule proves to be an alternative to parties going arbitration, but in reality parties delegate their right to their lawyers and this goes against the sanctity of the doctrine of party autonomy, particularly when it is considered from the standpoint of how it originated. It may be argued that the lawyer's autonomy has replaced party autonomy, and this transformation is disturbing. Despite the short-comings should not be used as an excuse to undermine its effectiveness as the main source of concerning jurisdiction on the tribunal to grant provisional measures. Any prevailing issues that denying the effectiveness of arbitral tribunal or party autonomy might have adverse effect and hence open doors to denying tactics and obstruction, thus undermining the arbitration agreement.

[110] See Model Law Article 15.
[111] (1985) 473 US 614 at 630-639.