INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR HARMONIZED LEGAL REGIME ON COURT ORDERED INTERIM MEASURES OF RELIEF

by

Mohammed Muddasir Hossain

A thesis submitted in conformity with the requirements for the degree of Master of Laws

Graduate Department of the Faculty of Law
University of Toronto

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Direction du Patrimoine de l'édition

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence
ISBN: 978-0-494-85218-7

Our file Notre référence
ISBN: 978-0-494-85218-7

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ABSTRACT

This thesis is an attempt to consider some of the challenges facing the regime of international commercial arbitration (ICA) in the contemporary global economy. It examines the governance mechanism of the regime of ICA in a globalizing economy. The thesis seeks to analyze the process of harmonization of the law of ICA with particular reference to availability of interim measures from court. In particular, the analytical focus is on how the globalizing economy affects the requirement of "court-ordered interim measures" in the arbitration process and how international arbitral regime attempts to cope with such changing demand of the globalizing economy. The thesis emphasizes the importance of harmonizing the national laws on the above-mentioned issue through ratifying international conventions as opposed to formulation of non-mandatory UNCITRAL Model Law.

ACKNOWLEDGMENTS

I would like to thank my wife Margia, who has been patient and supportive while I have been researching and writing this thesis. I also owe a debt of gratitude to my parents, who have always supported my academic adventures and have always been the driving force in all my endeavors in life. I would also like to thank my parents-in-law without whom I would not have been able to complete this work.

Finally, I would like to express my deep gratitude to Professor David Schneiderman, my thesis supervisor, who showed remarkable patience and friendship during this process. Without David's guidance and thoughtfulness, this thesis would not have been possible.

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INTRODUCTION

Globalization has rendered international transactions more frequent and has shown inadequacy of national laws as a regulatory instrument thereof. Innovations in information technology and computer networks, a global shift towards market economies within nation states and regional and multilateral free trade agreements, have all led to an increasingly globalized world economy[1]. Due to rise of globalization and the expansion of trading frontiers, international commercial transactions have significantly increased in both numbers and complexity[2] resulting in increased number of disputes[3]. Consequently, international commercial arbitration (ICA) has emerged as an important method for resolving such disputes arising in private cross-border or transnational economic transactions[4]. As business practices and strategies have become increasingly complex and transnational, ICA has become the leading alternative to litigation as a means of settling international commercial and business disputes in a neutral forum[5].

This paper does not seek to analyze the effects of the transformation of the global order on the regime of ICA. Nor does it seek to put forward a general discussion on the process of harmonization of the national laws on ICA. The scope of this thesis is much more limited and narrow. This thesis, a project for harmonization of law, proposes to explore the following question:

> "*Is harmonization of national laws on ICA, particularly on 'court-ordered interim measure', necessary or appropriate in an increasing globalized world?"*

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[1] *See* Katherine Lynch, The Forces Of Economic Globalization: Challenges To The Regime Of International Commercial Arbitration 1-2 (2003).

[2] *See supra* note 1, at 1-2 (explaining that technological innovations and free trade agreements led to an increase in the number of cross-border transactions, making business strategies and practices increasingly complex).

[3] *See* William Wang, Note, "International Arbitration: The Need for Uniform Interim Measures of Relief" (2003) 28 BROOK. J. INT'L L. 1059, 1059 (noting that increased international trade fostered disputes between states, businesses, and individuals);

[4] Alan Redfern& Martin Hunter, Law and Practice of International Commercial Arbitration (3rd Ed., 1999) at 1.

[5] *See* Christopher R. Drahozal, "Commercial Norms, Commercial Codes, and International Commercial Arbitration" *(2000)* 33 Vand. J. Transnat'l L. 79, 95

In international litigation and arbitration, the availability of provisional measures can have a substantial effect on the outcome of the proceedings, especially when issues relating to protection of evidence and assets arise before or during the course of the proceedings[6]. In international litigation this has been effectively covered by the rules and procedures developed by most nations[7]. The state courts have the right tools to enforce their orders. The availability and handling of interim measures in ICA has also become one of the main issues in developing a legal setup for arbitration. As in litigation, interim measures are the tools to preserve and ensure the usefulness of arbitration. Failure to preserve the evidence or protect the property involved in the dispute can prove disastrous for a party to arbitration, as there may be nothing left for the successful party to satisfy the claim[8].

Availability of interim measures in ICA largely depends on international conventions, national legislations and institutional rules. Although international conventions for the most part are silent on this issue, national legislations and institutional rules, have differing interpretations. Many nations have amended their legislations to provide for interim measures. The three main issues when dealing with interim measures in arbitration are power of the courts to grant interim orders, power of the arbitrators to order interim relief and the possibility of enforcement of interim orders granted by the tribunal. This paper is primarily concerned with the first category, i.e. court-ordered interim measures. In this regard, many nations either have amended the specific provisions or have repealed the old law and enacted new legislations. In common law countries, including India and Bangladesh, courts have dealt with this issue and have set precedents one way or the other on this subject.

With the rapid growth of ICA as a valuable adjudicatory tool and a viable alternative to litigation, it is imperative that the ongoing process of development and harmonization of the national law on ICA for the establishment of united legal framework consider the issue of

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[6] Raymond J. Werbicki, "Arbitral Interim Measures: Fact or Fiction?" (2002) 57-Jan. Disp. Resol. J. 62, 63

[7] Gary B. Born, "International Commercial Arbitration In The United States Commentary & Materials" 1 (1994) at 754.

[8] Richard W. Naimark and Stephanie E. Keer, "Analysis of UNCITRAL Questionnaires on Interim Relief, Global Center for Dispute Resolution Research"(March 2001) available at www.globalcenteradr.com

"*Court-ordered interim measures*". This thesis highlights the limitation of the prevailing international conventions on ICA, which fails to address this issue. In particular, this thesis looks at how the Convention on the Recognition and Enforcement of Foreign Arbitral Award ("the New York Convention") does not address the issue of power of national court to grant interim orders before or during arbitration proceedings. The core premise of this thesis is that availability of judicial intervention, albeit minimal, in the form of interim measures before or during arbitration proceedings is a crucial tool for ensuring the development and effectiveness of ICA in a globalizing economy. Therefore, development and effectiveness of ICA necessitates harmonization of national laws on the issue of "court ordered interim measures". This thesis argues that globalization, increased level of international trade and the transnational order of the international arbitral regime requires that harmonization of national law on "*court ordered interim measures*" must be ensured through enactment of a formal international convention concluded by states and the subsequent implementation of such conventions into national law instead of waiting for the national States to adopt the non-mandatory 2006 Reform of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law")[9].

For ease of understanding, I have divided this paper into four parts. Part-I contains a critical analysis of the concepts of harmonization, methods to achieve harmonization and harmonization of national laws within ICA. The purpose of the first part is to determine the role, if any, that harmonization can play in a legal context. Part II analyzes the relevance of national laws and national courts in the international arbitral regime. Part III discusses briefly the regime of ICA and focuses on provisions on interim measures, particularly court-ordered interim measures, in the context of ICA under the reformed Model Law. Lastly, in Part IV, the concept of

[9]The major premise of this thesis is that international convention or law making treaties, a primary source of international law, is preferable over a non-mandatory model law. The assumption is that compliance would be more likely under the former than under the latter. Although there is no empirical evidence to support the aforesaid assumption, the international law's binding quality and its ability to foster adherence, and therefore compliance, amongst national states is the foundation for such assumption. The drawback with the aforesaid premise is that it lacks the flexibility of a non binding model and contracting states may be reluctant or slow in ratifying the convention of its own free will. In the absence of empirical evidence to support the above assumption, regard may be had to the fact that majority of 146 states signatory to the New York Convention (including India and Bangladesh) had implemented the convention by giving effect to its provisions within their respective legal systems. Since this thesis is a project on harmonization of law on ICA it does not seek to provide an interactional account of international law in explaining the binding force of international law. This raises critical questions which are beyond the scope of this paper.

harmonization of laws is applied to the domain of "court-ordered interim measures" in ICA. The primary purpose of this section of the paper is to evaluate the project for harmonization of national legislations on "court-ordered interim measures" in ICA as law reform. To this end, it is intended to raise and discuss issues essential to the reform project, namely: (a) conceptual and substantive diverse elements in the laws on "court-ordered interim measures" in ICA; (b) the rationale for or problem to be resolved by harmonization, i.e. whether and why such diversity is problematic; (c) the ultimate goal of harmonization; and (d) finally presents recommendation(s) for resolution of the problem, i.e. method by which the goal is to be achieved.

I. HARMONIZATION AND LAW

Harmonization and uniformity played a particularly important role in efforts to 'internationalize' arbitration law. The two terms are in many ways complimentary, although harmonization generally involves a common understanding of the meaning of certain terms or the substance of certain concepts, while uniformity is generally part of a larger process requiring agreement on rules. Unification of laws had as its original goal the standardization of legislation by means of uniform model codes or statutes that sovereign states would adopt and consistently apply. However, in recent times, there has been a gradual shift in unification movement as it moved away from uniformity and become associated with the notion of harmonization[10].

One response to the pressures associated with economic globalization and increased international trade generally, is the belief in the need for and efficiency of a harmonized trading regime. In a globalizing economy the assumption is that harmonization of national institutions, law and regulatory policies is desirable and necessary for ensuring free trade[11]. Numerous scholarly literatures embrace the notion of harmonization being the mechanism by which unfair

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[10] *See* Martin Boodman, "The Myth of Harmonization of Laws" (1991) 39 Am. J. Comp. L.699 at 705.

[11] This move toward harmonization is often referred to as 'fair trade' of the 'level playing field'. The central idea is that lesser regulatory practices provide an unfair advantage in international trade. For further discussion *see* Jagdish Bhagwati, "The Demands to reduce Domestic Diversity among Trading Nations" in Fair Trade and Harmonization: Pre Requisite For Free Trade 41 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996).

differences in legal regimes are eliminated, and security of transactions ensured[12]. With the growth of the process of globalization, and the consequent approximation of economies, problems have a greater tendency to arise on a global basis, evidencing the necessity for harmonization of laws.

Recently, claims for harmonization of national laws on ICA have been closely linked to the development of globalization and to claims for "fair trade"[13]. In order to determine whether and to what extent harmonization of national laws plays a role in the regime of ICA, it is essential to examine its constituent element. In this section, I will examine harmonization as a general concept to evoke its inherent characteristics. Subsequently, the general notion of harmonization will be applied to law and legal systems to ascertain the meaning of harmonization of laws.

Meaning of 'Harmonization'

There is no clear consensus among scholars on the meaning of 'harmonization'. The term 'harmonization' may have various meanings depending upon the context in which it is used[14]. David Leebron has loosely defined 'harmonization' as "making the regulatory requirement or governmental policies of different jurisdictions identical or at least more similar"[15]. Rene David has defined 'harmonization' as involving "…an understanding about the significance of certain concepts, on certain modes of rules formulation, and on the recognition of authoritative sources". Martin Boodman defines 'harmonization' as "a process in which diverse elements are combined or adopted to each other so as to form a coherent whole while retaining their individuality". The term 'harmonization' is refers not only to these results, but also to the process of achieving greater similarity. Moreover, like David Leebron, I have used the term "harmonization claim" as a normative assertion that the difference in the laws and policies of different jurisdictions should be reduced. Harmonization arises within the domain of inter-jurisdictional private transactions due to the political and legal sovereignty of states having distinct political and legislative

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[12] David W Leebron, "Lying Down with the Procrustes: An Analysis of Harmonization Claims" in Fair Trade and Harmonization: Pre Requisite for Free Trade? (Jagdish N. Bhagwati & Robert E. Hudee eds., 1996)

[13] *See* Leebron, *supra* note 8, at 41

[14] *See* Lynch, *supra* note 1, at 199

[15] *See* Leebron, , *supra* note 8, at 43

entities[16]. In the international context, harmonization claim is more often a claim that nations should adopt similar laws and policies even in the absence of a common political authority. Most harmonization claims are mixed in that they assert both the laws of two jurisdictions should be the same, and that the law of at least one jurisdiction should conform to 'better', 'higher' or more 'optimal' standard[17].

Justification for 'Harmonization'

It is important to consider why demands for harmonization of national laws, institutions and policies have arisen. It is important to appreciate that occurrence of international transactions, and in particular trading relationships, does not in itself create the need or claim for harmonization. International transaction will still go through notwithstanding the diversity. However, the fact that harmonization is not necessary for international trade does not rule out claims for it.

Here I set forth various purposes that harmonization might serve. At the outset, it is important to appreciate that this paper does not advocate that harmonization of laws is the best or the only means to pursue the said goals nor does it propose that harmonization of laws is conceptually and methodologically legitimate. These issues raise critical questions, which are beyond the scope of this paper. Here I outline some of the reasons that might make harmonization of differing national rules desirable.

Various justifications are given for the need for harmonization of domestic diversity. For example, Jagdish Bhagwati loosely groups the justifications for harmonization into four main categories: (a) philosophical factors including trans-border obligations, distributive justice, fairness and legitimacy; (b) structural reasons including changes in the world economy and kaleidoscope 'comparative advantage'; (c) economic factors such as gains from free trade (i.e. the absence of harmonization creates an unfavourable distribution of gains from free trade); and

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[16] Martin Boodman argues that the notion of political and legal sovereignty within a jurisdiction entails the unenforceability of foreign laws, meaning that there will be theoretical diversity of laws.

[17] *See* Leebron, *supra* note 8 and David Leebron, "Seoul Conference on International Trade Law: Integration, Harmonization and Globalization*"* (1996) 10:2 COL.J.ASIAN L.305, 309

(d) political demands for harmonization, including concerns over unfair competition, protectionist attitudes and demands for upward harmonization[18]. Normative Universalist claims for harmonization also supports the above claims. Although, internal modernization of law of a jurisdiction is also a goal, it is not really an argument in favour of harmonization[19].

Within ICA, the main justifications for harmonization of national arbitral regimes and practices generally include: (a) providing a jurisdictional interface to enable parties from different systems to interact or communicate; (b) fairness in international transactions and international trade competition; (c) economies of scale, and (d) political economies of scale[20]. David Leebron notes three other arguments often given to justify harmonization of laws including: (a) the presence of externalities (rules adopted in one jurisdiction can result in costs imposed on other jurisdictions); (b) leakage and non-efficacy of unilateral rules; and (c) assurance of trade transparency.

The most common justification often referred to in support of harmonization is fairness in trade competition. The essential idea behind this claim is that reduced regulatory laws or policies will result in states having an unfair advantage in international trade[21]. David Leebron argues that the fairness assertion justifying harmonization comprises both an economic aspect and a justice claim. The underlying economic justification is that divergent national policies or regimes distort conditions of competition.

Another argument put forth for harmonization is economics of scale. In international transactions legal costs represent an additional fixed costs and thus difference between legal systems create barriers to trade. Harmonization of the diversity between national legal systems substantially reduces information costs, enabling market entrance for even small transactions.

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[18] *See* detailed analysis in Bhagwati, *Supra* note 7, at 1-35

[19] *See* Leebron, *Supra* note 13

[20] *See* Lynch, *supra* note 1, at 200

[21] *See* Redfern & Hunter, *supra* note 26. Alan Redfern and Martin Hunter refer to in the context of ICA as the notion of a `level playing field`.

Despite these justifications given for harmonization of national diversity within international trade and commerce, not all commentators adhere to belief in harmonization. Some commentators doubt whether elimination of such diversity is necessary for free trade and international transactions generally[22]. Lord Goff, for example, stated, "We should not try to insist upon uniformity or harmonization of law which are different process"[23]. Jagdish Bhagwati, for example, argues that the assertion that harmonization of national institutions, laws and regulatory policies is necessary for free trade is an intuitive assertion lacking empirical foundation. Similarly, David Leebron cautions that there is no empirical evidence that differing national preferences and regulatory policies have any effect on international trade patterns[24]. Other commentators such as Bertil Ohlin also refute the arguments in favour of harmonization arguing that domestic diversity is compatible with mutual gains from trade and that trade will adopt itself to domestic differences[25]. Despite the theoretical debate over the inherent merits of harmonizing international trade regime, on-going practical efforts try to either unify or harmonize international trade and commercial law generally. As regards the justification behind demands for harmonization of national laws within the regime of ICA, please see below the discussion under Part IV.

Methods to Achieve Harmonization

This section illustrates the process of harmonization of law from the perspective of its vehicles. The main purpose is to understand how the global harmonization of law takes place in our society. Given the space constraints, it will not be possible to provide wide approach to this topic. However, for ease of understanding, I propose to set out briefly the various methods used to effect legal harmonization.

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[22] Since this paper is not intended to analyze the merits and de-merits of the harmonization process, I will not be addressing the doubts raised by various commentators about the legitimacy of the harmonization process. Furthermore, the aforesaid doubts, though inconsistent with the claim for harmonization need not be addressed for present purposes as the whole basis behind the claim is efficiency of the process and not necessity.

[23] *See* Lord Goff, *Windows on the World, in* International Commercial Arbitration For Today and Tomorrow 52 (John Tackaberry ed., 1991)

[24] *See* Leebron, *supra* note 8, at 74

[25] *See* Bertil Ohlin, "Some Aspects of Policies for Freer Trade" in Trade, Growth, and Balance of Payments: Essays in Honor of Gottfried Haberler 83 (R.E. Baldwin et al. eds. 1965)

The process of international harmonization ultimately results in some degree of convergence of legal and policy regimes. The same result, of course, may be achieved without formal international efforts and indeed, much harmonization is exogenous to the legal system[26]. Various methods (both mandatory and non-mandatory) have been used to effect legal harmonization, including the enactment of formal international conventions concluded by states and the subsequent implementation of such conventions into national law[27]. Under certain conditions, international convention may even allow the direct and immediate 'self-executing' implementation of private law codification into national law. Due to the limitation of attempting harmonization through binding international instruments, however, another less ambitious (and less costly) method of harmonization involves the formulation of harmonized rules through preparation of non-mandatory model laws, restatement of law, legal guides and uniform codes with modifications for jurisdictional preferences. Sometimes the individual convention and uniform laws aim at universal application, while others apply only to a defined group of states or region[28]. If a model law or uniform code is later adopted and incorporated by a national legislature or a comprehensive restatement serves as a model for subsequent legislation, these methods may also result in codifications[29]. The objective behind these more flexible approaches to achieve comparable national standard is to allow greater freedom to states through their own domestic constitutional process and legal vehicles to accommodate new international norms[30]. This approach is referred to as the 'soft law' approach. Notwithstanding the above-mentioned advantages of the soft law approach, it lacks the international conventions' binding quality and the ability to foster adherence among national states[31].

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[26] Unilateral harmonization may arise through the 'spontaneous' adoption of common standard or the application of offensive sanctions. *See* discussion in Leebron, *supra* note 8, at 81

[27] *See* Leebron, *supra* note 8, at 81

[28] *See* Michael J Bonnell, "international Uniformity In Practice- Or Where the Real Trouble Begins" (1990) 38 Am J Comp L.865

[29] *See* Roy Goode, "The Role of the UK in Common Law: Insularity or Leadership?" (2001) 50 Int'l & Comp. L.Q.751

[30] *See* C. Schmithoff, "The Unification or Harmonization of Law by Means of Standard Form of Contracts and General Conditions*"* (2001) 17 Int'l & Comp. L.Q.751

[31] *See* Supra note 10

'Harmonization' within ICA

What exactly does it mean to harmonize laws? The concept of harmonization of laws arises within comparative law regarding unification of laws and particularly in conjunction with inter-jurisdictional private transactions[32]. Legal regime and the broader societal choices in which they are embedded can differ in numerous aspects. Some of these differences are reflected in formal legal rules and institutions, and others are not. The role of harmonization in the legal reform process depends on the features or elements of law to be harmonized. International harmonization has been pursued in vast array of diverse fields within different states, namely: monetary and fiscal policy, contract law, environmental law, international trade and commercial law etc.

There has been a growing movement to free international arbitration from the control of national laws and courts brought about by the pressure associated with globalization, increased levels of international trade and attempts at establishing a harmonized unified legal framework through a form of transnational order[33]. This 'emancipation' of the international arbitral process from the influence of national law is reflected in the recent modernization of ICA through the process of "*harmonization*"[34], i.e. attempts to reduce the difference between national approaches to international arbitration by harmonizing national arbitration laws. Differences in these national legal systems are due to many varied and complex factors including- the organization and distribution of political power and institutions; economic systems, level of industrialization and stage of development, institutional structures, organization of authority, and religious, cultural and ethical value. Increased similarity or convergence in national arbitration laws is sought in order to harmonize transactional interfaces[35].

Pressures for harmonization began to mount within ICA in the late 1970's and 1980's, given the perceived inadequacies of existing national arbitration laws and the differences and variations in

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[32] *See* Lynch, *supra* note 1, at 197-198.

[33] V. Pechota, "The Future of the Law Governing International Arbitral Process: Unification and Beyond" (1992) 3:1 Am Rev. Int'l Arb. 17, 19-20.

[34] *See* Lynch, *supra* note 1,

[35] The goal of harmonization is to limit the difference between national arbitration laws and thus, reduce the uncertainty associated with multiplicity of arbitral regime.

legal systems[36]. An earlier attempt at harmonization was made through the adoption of the 1958 New York Convention by various national states. By the early 1980's there was a clear distinction between the small number of arbitration friendly states with adequate international arbitration laws and well developed body of case law and many other states which had yet to modernize their international arbitral regime[37]. In response to criticisms over the antiquated state of many national arbitration laws, and to serve the needs of the users of ICA, efforts towards reform of national arbitration laws began. As a result, UNCITRAL began work on harmonizing national arbitration laws dealing with ICA using the New York Convention as the cornerstone[38].

The harmonization policy as implemented by UNCITRAL refers to the international unification of law to reduce or eliminate the discrepancies between national legal systems by inducing them to adopt common principles of law[39]. UNCITRAL has adopted many methods to further harmonization or unification of the law of international trade law, including international conventions model treaty provisions, model laws, uniform rules for the use of parties to private transactions, legal guides and recommendations etc.

UNCITRAL sought to eliminate barriers to ICA created by differing levels of state control and varying arbitration laws by drafting a model law and group of uniform rules on ICA. This harmonization approach is reflected in the efforts of UNCITRAL in the drafting and diffusion of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") together with the New York Convention and the Arbitration Rules of the UNCITRAL, 1976 ("UNCITRAL Arbitration Rules"). UNCITRAL cast its rules in non-mandatory form through drafting of the Model Law. The Commission considered that complete uniformity was desirable but not necessary. Moreover, it considered that the objective of harmonization of law in this area

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[36] *See* discussion of this point in W. Laurence Craig, "Some Trends and Developments in the Law and Practice of International Commercial Arbitration" (1995) 30 tex. Int'l L.J. 1 at 25.

[37] *See* discussion of this point in Fouchard Gaillard Goldman On International Commercial Arbitration 47 (Emnanul Gaillad Goldman and John Sarage eds., 1999), at 21;

[38] *See* below for further discussion on New York Convention ;

[39] Harmonization in the context of UNCITRAL can be defined as making regulatory requirements or government policies of different jurisdictions identical (or, at least, similar). *See* Leebron, *supra* note 8, and Konrad Zweigert & Hein Kotz, Introduction to Comparative Law (3rd ed., 1998).

could be achieved most effectively and efficiently by enabling states to agree on a set of uniform rules that was a model and that their national legislation could, if necessary, adapt to the specific local circumstances and requirements in implementing those rules[40]. The essential difference between using a convention and model law to achieve harmonization is the degree of flexibility as regards the extent of acceptance. State may decide to copy the model law, or modify it, or to adopt only a few of its provisions[41].

Harmonization of national law on ICA for creating a harmonized legal environment has become one of the most important challenges globalization pose today. A harmonized legal environment is a key to improving ICA, international commerce and hence economic growth[42]. The process of harmonization acknowledges the role of national laws and courts in the international arbitration process, albeit with greater recognition of party autonomy and more limited judicial intervention. Because of harmonization, the law relating to ICA is now conducted, in many respects, in a similar manner throughout the world. The New York Convention has brought about similarity, amongst others, in the role of courts after the conclusion of the arbitral process with respect to the arbitral award by harmonizing the grounds for setting aside and refusal of recognition and enforcement of arbitral awards[43]. Countries that have not ratified the New York Convention have followed this restrictive approach towards judicial review of arbitral awards. Despite this, important procedural divergences remain, especially with reference to the degree of court intervention before and during the course of arbitral proceedings**.** In particular, less similarity can be found in the degree of court intervention during arbitration procedures. The

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[40] See *Report on the United Nations commission on International Trade Law on the work of its 18th Session -3-21 June 1985,* UN GAOR, 40th Sess. Supp. No.17, U.N.Doc.A/40/17 (August 21, 1985)

[41] *See* G Hermann, *The UNCITAL Arbitration Laws: A Good Model of a Model Law,* 3:2 UNIFORM L. REV. 483, 485 (1998)

[42]Commentators such as David Leebron suggest that there is no empirical evidence to support the claim that uniform legal environment promotes international commerce and economic growth. Given that, this thesis is not intended to deal with the legitimacy of harmonization process and principle objections against it, in my view it is currently not necessary to defend the contention. Moreover, the claim for uniform legal environment through the process of harmonization is based on the notion of increased efficiency rather than necessity and as such, the claim need not be supported by empirical evidence.

[43] Example of an instance where the binding quality of an multi-lateral international convention such as New York Convention was able to foster adherence among contracting states through treaty implantation, i.e. by giving effect to the provisions of the treaty within the national legal systems, a success which would not have been possible to achieve through soft law approach.

analytical focus of this thesis is on the issue of "court ordered interim measures". However, any discussion on harmonization of national laws on "court ordered interim measures" in ICA would be incomplete without a brief discussion on the relevance of national state, particularly national law and national court, in the regime of interim measures in ICA.

II. RELEVANCE OF NATIONAL STATE IN THE INTERNATIONAL ARBITRAL REGIME

The process of ICA is essentially a private system of transnational dispute resolution that proceeds without state involvement. Laurence Craig refers to this as a process that operates at the 'margins of the law' or 'beneath the iceberg' in that the vast majority of disputes that proceed through arbitration are resolved without any judicial recourse[44]. At the same time, however, ICA is not an autonomous self-sustaining system existing separate and apart from national legal systems, but rather one that intersects with national legal system at various points in the arbitration process[45]. There is an interlocking relationship between ICA and national law, international treaties and conventions[46]. Its effective operation, however, is dependent upon a complex regime of national laws[47], multilateral conventions, and bilateral treaties[48].

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[44] *See* Craig, *supra* note 33, at 5

[45] Involvement of different national legal systems is often necessary at three critical stages: enforcing the agreement to arbitrate, supporting the effectiveness and fairness of arbitration proceedings, and recognizing and enforcing the arbitral award ultimately rendered.

[46] Alan Redfern and Martin Hunter describe ICA as 'hybrid' system; Redfern & Hunter, *supra* note 4, at 11 and 341-344.

[47] Each ICA requires reference to a variety of national system of laws. Firstly, there is a law governing the recognition and enforcement of the arbitration agreement and the performance of that agreement. Secondly, there is a law regulating the actual arbitration proceeding before the arbitrators (often national law of the place of the arbitration, also known as *lex arbitri*). Thirdly, there is a law (or set of rules) applied by the arbitration to the substance of the parties' dispute-often referred to as the 'applicable law' or 'governing law'. Fourthly, there is a law governing the recognition and enforcement of arbitral award. Although these laws may be the same, more often than not they are different.

[48] *See* Lynch, *Supra* note 1, at 10-11, 18, 20-22

Although it is true that much of the process of ICA occurs with little, if any, state involvement[49], national states play an important role in two main areas: (a) the use of national laws in the arbitration process[50]; and (b) the use of national courts for supervision of the arbitral process and enforcement of arbitration awards. Although an ICA starts with a private agreement between the parties and continues by way of private proceedings, it ends with an arbitral award that is binding on the parties and which most national courts will recognize and enforce, if necessary. Thus, national states and their legal systems play an important role in the international arbitral system.

A. National Law

While transnational business and commercial transactions involve the diverse interests of the international business community engaged in cross-border business and commerce, they are generally resulted through the application of national law[51]. If any dispute arises in such transactions, arbitration agreement between the parties may not be sufficient to resolve the conflict and the judge must refer to the applicable national law for assistance. The applicable national law is traditionally determined either by the choice of law clause within the contract or by application of the relevant national conflict of laws rules.

There is a complex and dynamic relationship between the will of the arbitrating parties and the national legal systems within the international arbitral regime. This reflects the interaction between the consensual nature of the arbitration process and the legitimacy and support, which national legal systems confer on the arbitral process. In fact, most developed trading nations and many other states have enacted arbitration legislation that provide for and permit judicial support and supervision of the international arbitration process and enforcement of arbitration agreements and awards. The scope of such legislation may vary from one state to another. However, such legislations generally deals with issues such as: the parties autonomy to agree on procedural and substantive issues in the arbitration; procedural issues; appointment and removal

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[49] At the margins of law or beneath the 'iceberg', to use William Craig's expression discussed earlier. *See* Craig, *supra* note 33

[50] ICAs potentially involve national laws at different points in the arbitration process.

[51] International commercial transactions are not always effectively regulated through the application of national laws. *See* further discussion of this point in Klaus Peter Berger, The Creeping Codification Of Lex Mercatoria 12 (1999).

of arbitrators; the extent of judicial supervision or interference in the arbitration proceedings; the arbitrator's liability and ethical standard; and the form and making of the arbitral award.

National laws are potentially involved at five different points in the international arbitration process:

(a) the law governing the capacity of the parties to enter into an arbitration agreement;

(b) the law applicable to the arbitration agreement;

(c) the law applicable to the arbitration proceedings, which regulates the conduct of the arbitration proceedings(often referred to as the *lex arbitri*[52]);

(d) the law applicable to the substance or merits of the dispute, which determines the rights and obligations of the parties in relation to their substantive contract[53]; and

(e) the law governing recognition and enforcement of arbitral award by national states.

Since it is possible for each of these five issues to be the subject of different national laws, problems can arise with the application of a myriad of national laws to the international arbitral process whose legislative provisions often vary from state to state.

B. National Court

Although ICA is essentially a private method of resolving cross-border commercial disputes, it operates in the 'shadow' of the national courts[54]. These courts may be called upon to provide the following support:

(a) to protect the integrity of the arbitration process (e.g. if arbitrators act in excess of authority granted to them by the parties);

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[52] Also referred to as the 'curial' law. The scope of the *lex arbitri* varies from state to state and may include rules governing issues such as the arbitrability of the dispute, the appointment and removal of arbitrators, the conduct of the arbitration, granting of interim measures of protection (orders by national courts or arbitrators for preservation or storage of goods), the power of national courts to provide supportive measures to assist an arbitration (i.e. to fill vacancy in the arbitral tribunal in the absence of any other mechanism), the supervisory powers of the court (i.e. to review the arbitrators conduct and remove them from misconduct), and the form, validity and finality of the arbitration award. *See* further discussion of the meaning of the *lex arbitri* in Alan Redfern & Martin Hunter, Law And Practice Of International Commercial Arbitration 79 (3rd ed., 1999) and O. Chukwumerije, Choice Of Law In International Commercial Arbitration 77 (1994)

[53] Often referred to as the 'applicable law' or 'the governing law';

[54] *See* Lynch, *supra* note 1, at 169

(b) to render assistance to the process itself (e.g. to order interim protection of the subject matter in dispute etc) and;

(c) to compel compliance with arbitration agreements and arbitration awards ultimately rendered.

In recent years, ICA has experienced a rapid expansion in use[55]. Notwithstanding its various advantages, ICA has other significant discrepancies and dilemmas that need to be resolved. A major disadvantage of the current state of ICA, which will be addressed in this paper, is the lack of uniform provision on "court-ordered interim measures" in aid of arbitration in national legislation. This paper will argue that, in order for the system of ICA to function effectively, a uniform procedure for the awarding of "court-ordered interim measures" is necessary. Interim measures are an absolute necessity to protect what is at stake in the arbitration. Regardless of whether evidence, real property, personal property, or financial assets needs to be preserved, there must be an effective procedure for maintaining the status quo. Without the protection of such provisional remedies, the outcome of the arbitration could become meaningless to the winning party. However, any discussion on harmonization of national laws on "court ordered interim measures" in ICA would be incomplete without a brief description on the regime of interim measures in ICA.

III. REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION

The discussion in this part proceeds as follows. In the first section I will discuss briefly the background information concerning ICA, in particular the following: (a) legal framework of the system of ICA; (b) examine United National ("UN") Commission on International Trade Law ("UNCITRAL") and its role in the drafting of the Model Law on ICA; (c) examine the UN Convention on the Recognition of and Enforcement of Foreign Arbitral Awards ("New York

[55] For a discussion regarding the increased use of arbitration, see generally Peters Sanders, Quo Vadis Arbitration? *See also* Charlotte L Bynum, *International Commercial Arbitration,* ASIL Guide to Electronic Resources for International Law (Mar.2001), *at* http://asil.org/resource/arb1.htm

Convention")[56]. In the second section, I will discuss the regime of interim measures, particularly "court ordered interim measures", within this legal framework of ICA and problems associated with it.

A. BACKGROUND

(a) Legal Framework for ICA

The high degree of uncertainty and risk associated with litigating international business disputes in national courts has also been a contributing factor in the prominence of ICA as the preferred method of resolving international business and commercial disputes. One of the essential characteristics of ICA is the consensual nature of the arbitration process itself. The legal basis for arbitration lies in agreement by parties to submit disputes to an arbitral tribunal[57], i.e. arbitration proceedings are viewed as an expression of the will of the parties. The arbitration agreement defines the issues to be addressed by arbitration and the jurisdiction of the tribunal[58]. Thus, where a dispute arises between parties who have entered into an arbitration agreement, the parties, subject to few exceptions, are obligated to resolve their disputes according to the agreement.

Effective operation of ICA, however, is dependent upon a complex regime of national laws, multilateral conventions, and bilateral treaties[59]. Each ICA requires reference to a variety of national system of laws[60]. Firstly, there is a law governing the recognition and enforcement of the arbitration agreement and the performance of that agreement. Secondly, there is a law regulating the actual arbitration proceeding before the arbitrators (often-national law of the place

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[56] United Nation Convention on the Recognition of and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T.2517, 30 U.N.T.S. 3(1958) [hereinafter New York Convention].
[57] *See* Larsen, *Supra* note 5
[58] *Ibid*
[59] *See* Lynch, *supra* note 1, at 10-11, 18, 20-22
[60] *See* Redfern & Hunter, *Supra* note 4, at 2

of the arbitration)[61]. Thirdly, there is a law (or set of rules) applied by the arbitrator to the substance of the parties' dispute-often referred to as the 'applicable law' or 'governing law'. Fourthly, there is a law governing the recognition and enforcement of arbitral award. Although these laws may be the same, more often than not they are different.

The arbitration process generally consists of: (a) an agreement to arbitrate; (b) selection of arbitrators by the parties; (c) agreement on the procedure to be followed by the arbitrators; (d) an arbitration hearing before a single arbitrator or panel of arbitrators followed by the rendering of a binding award; (e) the award being considered final and binding in jurisdictions; and (f) the enforcement of the arbitration award with limited grounds for refusing enforcement. The parties must decide in the arbitration agreement whether they wish to refer to and adopt the processes of a particular institution, or tailor their own process on an ad hoc basis. Depending on which form is chosen, parties may use recommended clauses of arbitral institutions.

If the parties choose international arbitration, they agree to submit their dispute to an institution, who will administer the arbitration. Some of the most common institutions include the American Arbitration Association ("AAA"), International Chamber of Commerce ("ICC"), or the London Court of International Arbitration ("LCIA"). An agreement for institutional arbitration can resolve most of the procedural and jurisdictional questions simply through reference to the institution and its procedural rules. In an ad hoc arbitration, the parties have the freedom to choose the rules, which would govern the arbitration proceedings. If the parties choose ad hoc arbitration, greater care needs to be given to identifying various procedural issues. A simpler alternative to trying to design a complete ad hoc procedural system is to designate one of the established procedural rule systems. One of the more common ad hoc arbitrations is one where the parties agree to arbitration by the UNCITRAL Arbitration Rules, with various modifications.

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[61] This is the law governing existence and proceedings before the arbitral tribunal often referred to as the *lex arbitri.* All matters relating to the conduct and procedure of the arbitration are subject to this law. For example, questions of how arbitrators are appointed, how they can be challenged, their powers for admission of evidence, and what remedies they can award, are all subject to the ultimate control of the law of the arbitration. Under the choice of law rules of almost all national legal systems, the basic rule applied is the "seat theory," that is, the law of the arbitration will be the law of the place where the arbitration is situated. It is also possible that the *lex arbitri* may be a different national law than that governing the substance of the parties' dispute or governing the arbitration agreement. In ICA practice, it is rare for parties specifically to choose the *lex arbitri*, and the choice of the place of arbitration is now recognized as shorthand for the method of selection of that law.

(b) UNCITRAL and the Drafting of the Model Law on ICA

UNCITRAL can be characterized as an epistemic community or a group of knowledge-based expert[62]. UNCITRAL viewed itself as a-political legal organization engaged in the technical process of harmonization and unification and operating via a consensus basis of decision-and policymaking[63]. UNCITRAL sought to harmonize national arbitration procedures worldwide through the enactment in 1985 of a model law dealing specifically with ICA, referred to as the 'UNCITRAL Model Law on International Commercial Arbitration'. The stated objectives of UNCITRAL in drafting the Model Law were to harmonize national arbitration laws for international arbitration and to establish rules that would meet the needs and requirements of international arbitration[64]. The expressed view was that uniformity, or at least essential similarity, of national arbitration laws in various legal and economic systems would facilitate the development of ICA[65].

UNCITRAL's proposal for a model law rather than a convention or a uniform law to achieve harmonization was due to difficulties of obtaining multilateral agreement on a precise text among nation states due to wide variation in existing national laws[66]. UNCITRAL choose this 'soft law' approach to work towards a recognized similar norm rather than to insist on uniformity among national arbitration legislation[67] as it was mindful of not encroaching upon the internal `adopt the Model Law as a guide in reforming national arbitration legislation[68].

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[62] *See* Peter Fromuth & Ruth Raymond, "UN Personell Policy Issues in United Nations Management and Decision Making Project" 13 (1987); also *see* Douglas Williams, "The Specialized Agencies and the United Nations" 254 (1987).

[63] *See* Howard M Holtzmann & Joseph E Neuhaus, "A Guide to the UNCITRAL Model Law International Commercial Arbitration: Legislative History and Commentary" 6 (1989), at 361

[64] *See* K. Lionnet, "Should the Procedural Law Applicable to International Arbitration be Denationalized or Unified? The Answer of the Model Law", (1991) 8:3 Int'l Arb. 5.

[65] *See* G. Hermann, "The Role of the Court under the UNCITRAL Model Law Script" at 166.

[66] *See* Lynch, *supra* note 1, at 214

[67] *See* Fouchard Gaillard Goldman, *supra* note 34, at 103-104

[68] *See* Fouchard Gaillard Goldman, , *supra* note 34, at 108-109

The final text of the Model Law was adopted by UNCITRAL on June 21, 1985. The General Assembly approved the Model Law on December 11, 1985, and requested the transmittal of the text to the member states and arbitral institutions together with the *travaux preparatories*. Today, states from all over the world have adopted the Model Law. Some countries have adopted the Model Law as both their domestic arbitration law and their international arbitration law, while others prefer two separate regimes of law. Even countries that have not adopted the Model Law have clearly considered the Model Law at the time enacting national legislations, as evidenced by the English Arbitration Act of 1996. It is pertinent to note that although Model Law may present a view of complete harmony and understanding in many aspects of ICA, but this is not necessarily the case[69].

(c) UN Convention on the Recognition of and Enforcement of Foreign Arbitral Awards ("New York Convention"),

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" or the "New York Convention"[70] is one of the key instruments in international arbitration for recognition and enforcement of foreign arbitral award. The Convention is also important in the international system that ensures that agreements to arbitrate will be respected by the national courts. The New York Convention entered into force in 1959 and as of 2009 over 146 states worldwide had ratified the convention[71]. It is the main international convention relevant to ICA and is one of the central reasons for the tremendous growth in popularity of international arbitration from 1960s onward.

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[69] As evident from Articles 9 and 17 of the Model Law which governs interim measures of relief

[70] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T.S. 3(1958)

[71] The updated list of Contracting States to the New York Convention can be found at UNCITRAL website, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited June 27, 2012)

The New York Convention has been described as "the single most important pillar on which the edifice of international arbitration rests"[72]. The New York Convention established a new legal regime favouring international arbitration through the facilitation of recognition and enforcement of arbitral agreements and awards. The goal contemplated by the New York Convention is to facilitate the *recognition and enforcement of foreign arbitral awards* and *the referral by a court to arbitration.*

The first action envisaged under the New York Convention is the recognition and enforcement of foreign arbitral awards, i.e., arbitral awards made in the territory of another Contracting State. This field of application is defined in Article I. The general obligation for the Contracting States to recognize such awards as binding and to enforce them in accordance with their rules of procedure is laid down in Article III. A party seeking enforcement of a foreign award needs to supply to the court (a) the arbitral award and (b) the arbitration agreement (Article IV). The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement by domestic courts for basic fairness and consistency with national public policy which are listed in Article V(1). The court may also on its own motion refuse enforcement for reasons of public policy as provided in Article V (2).

The second action contemplated by the New York Convention is the referral by a court to arbitration. Article II(3) provides that a court of a Contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration (unless the arbitration agreement is invalid).

B. *"COURT ORDERED INTERIM MEASURES" IN ICA: MODEL LAW AND COMPARATIVE STUDY OF NATIONAL LEGISLATIONS AND COURT RULINGS*

At the most fundamental level, interim measures of protection are forms of temporary relief[73] intended to safeguard the rights of the parties until the arbitral tribunal issues a final award[74].

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[72] J. Gillis Wetter, "The Present Status of the International Court of Arbitration of the ICC: An Appraisal" (1990) 1 Am. Rev. Int'l Arb. 91

[73] John Charles Thomas, Selected Issues: Interim Measures in International Arbitration: Finding the Best Answer

Interim measures of protection arise in a variety of circumstances in international arbitration and their uses vary depending on the context and forum[75]. The purpose of court-ordered interim measures is to make the ultimate decision of the arbitral tribunal more effective. Interim measures can have "final and significant consequences" without which an adverse party may easily render an award meaningless. Interim measures or reliefs can be broadly classified into the following categories[76]:

(a) reliefs which are procedural in nature and which the arbitral tribunal cannot order or cannot enforce, e.g. compelling the attendance of witness, anti-suit injunctions etc.

(b) reliefs which are evidentiary in nature and are required to protect any document or property as evidence for the arbitration;

(c) reliefs which are interim or conservatory in nature and are required to preserve the subject matter of the dispute or the rights of a party thereto or to maintain the status quo and to prevent one party from doing a particular act or from bringing about a change in circumstances pending final determination of the dispute by the arbitrators. Such relief can be provided by granting a *Mareva* injunction[77], anti-suit injunction[78], attachment order etc.

The discussion under this part proceeds as follows: First, I propose to discuss the provision of court-ordered interim measures under the 2006 Amendments to the UNCITRAL Model Law. In the second part, I will discuss the handling of court ordered interim measures by national legislations and national courts in Bangladesh, Canada, and India.

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[74]UNCITRAL, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Report of the Secretariat, 42, delivered to the General Assembly, U.N. Doc. A/CN.9/264 (Mar. 25, 1985);

[75]*See generally* Gary B.Born, *International Commercial Arbitration* (2009);

[76] Page-112, *International Arbitration and National Courts: The Never Ending Story*

[77]*Silver Standard Resources Inc. v. Joint Stock Co. Geolog,* (1998), 168 D.L.R. (4th) 309 (B.C.C.A.)

[78]*Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC,* (2008) 305 D.L.R. (4th) 432; 2008 ONCA 872

UNCITRAL Model Law

The original version of the Model Law simply enumerated that a court may intervene in the arbitral process, without specifying the procedures and limits of this intervention. Consequently, crucial issues, such as the enforcement by courts of procedural orders issued by the arbitral tribunal or granting of interim order for preservation of assets out of which a subsequent award may be satisfied, were left unanswered. A first attempt to provide a harmonized discipline in this regard has been carried out with the 2006 reform of the UNCITRAL Model Law, by introducing a more detailed regulation of interim measures of protection including the most important case of court intervention during arbitral proceedings. Although the 2006 reform addresses this issue, one can only hope that, the national states would adopt the relevant provisions into their national legislations. However, the Model Law does not impose any obligation on the State to do so, in contrast to the New York Convention.

Although interim measures are frequently used in arbitration, none of the international conventions has provisions regulating the said regime. New York Convention is one of the key instruments in international arbitration for recognition and enforcement of *foreign* arbitral awards. It is the only convention that ensures that agreements to arbitrate will be respected by the national courts and enables them to pass an interim order to refer the dispute to arbitration. In this regard, Article II (3) of the New York Convention states that disputes that are subject matter of an arbitration agreement shall be referred by court to arbitration. Apart from the above power of court to grant interim order during or before arbitration proceedings, this issue is mostly regulated by national legislations and institutional rules. Other international conventions on ICA are silent on this issue. Recognizing the need for provisions on "court-ordered interim measures" in the context of increased globalization, UNCITRAL revised the original Model Law by inserting a new chapter IVA "*Interim Measures and Preliminary Orders"* to conform to current practices in international trade. It is pertinent to mention that Article 9 of the Model Law read with Paragraph 21, 22 and 30 of the *Explanatory Note by the UNCITRAL Secretariat on the Model Law (With Amendments as adopted in 2006) on International Commercial Arbitration* ("Explanatory Note") puts it beyond any doubt that existence of an arbitration agreement does not infringe on the power of the court to order interim measures. In view of this, many nations

have either amended the specific provision or repealed the old law and enacted new legislation containing provisions for "*Court-ordered interim measures*".

In countries that adopted the 2006 reform, national courts have the power to issue interim measures in relation to arbitration proceeding "*irrespective of whether their place is in the territory of this state.*"[79] Article 1(2) of the Model Law provides that reference to arbitration, interim measure of protection, and recognition and enforcement of an award are few matters with respect to which national courts in all jurisdictions can exercise their power to assist arbitration. On the other hand, countries that have not adopted the Model Law allow their national legislation to determine whether the court has the relevant power notwithstanding the place of arbitration. The latter situation can give rise to diversity among national arbitration legislations on the issue of "court-ordered interim measure" which may have severe consequences in outcome of the arbitration proceeding or enforcing the arbitral award. For example, in some countries, which did not adopt the 2006 Reform of the Model Law, the national arbitration legislations contain provisions that allow national courts to grant interim relief *only if the place of arbitration is in the territory of that state*. Hence, in an ICA with a seat in, say, London, an aggrieved party cannot seek injunction from national court of a non model country to prevent the defendant from alienating his assets, especially where a substantial portion of it is located in the territory of that State. The above is a good example of an instance where harmonization of the laws of ICA based on non-mandatory UNCITRAL Model Law is not sufficient.

Example of National Legislations and Decision of National Courts leading to diversity

Bangladesh

Bangladesh is among the 146 countries (as of 2011) that have ratified the New York Convention. In its attempt to comply with the obligations under the New York Convention, the Government of Bangladesh repealed the outdated Arbitration and Conciliation Act, 1956 and enacted the Bangladesh Arbitration Act, 2001 ("the 2001 Act"), which was based heavily on the UNCITRAL Model Law. According to the Preamble, the object of the 2001 Act is "to enact the law relating to international commercial arbitration, recognition and enforcement of foreign

[79] See Article 17I read with Article 1(2) of the UNCITRAL Model Law

arbitral award and other arbitrations". Being based heavily on the Model Law, the 2001 Act incorporates a range of laudable provisions, such as empowering national courts to issue various interim orders including injunctive relief, security for costs, pre-disclosure of documents and preservation of evidence.

Controversies, however, flamed with section 3 of the 2001 Act, which reads as follows:

"Section 3. Scope-*(1) This Act shall apply where the place of arbitration is in Bangladesh. (2) Notwithstanding anything contained in sub-section (1) of this section, the provisions of sections 45, 46 and 47 shall also apply to the arbitration if the place of that arbitration is outside Bangladesh"*

The above section is based on Article 1 (2) of the Model Law, which reads as follows:

"Article 1. Scope of application- *(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.*[80]*"*

The failure of the legislatures to amend the 2001 Act in light of the amended Article 1(2) to include Section 7, 7A and 10 of the 2001 Act (similar to Article 8, 9, and 17J of the Model Law) into Section 3(2) of the 2001 Act is a clear indication of the lack of legislative diligence that exist in Bangladesh. This oversight of the legislatures eventually led to the apex court of the country interpreting Section 3 of the 2001 Act very narrowly. In *Unicol Bangladesh Blocks Thirteen and Fourteen v Maxwell Engineering Works Limited and another*[81], the Appellate Division of the Supreme Court, the apex court of the country, held that in light of section 3(1), the provisions of the Act is applicable only for ICAs held in Bangladesh. In the absence of any ambiguity in the wording of section 3(1) of the 2001 Act, the Appellate Division gave the said provision a literal interpretation. Such literal interpretation of S. 3 (1), as given by the Appellate Division in *Unicol*[82] and previously in various High Court decisions[83], was resulting in hardship to parties to international arbitrations. This current reading of section 3(1) essentially slams the door on a

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[80] Article 1(2) of the Model Law was amended by the United Nations Commission in 2006.

[81] 56 DLR (AD) (2004)166

[82] Also in the unreported decision of *Civil Petition For Leave to Appeal Nos. 73-75/1982*

[83] *Uzbekistan Airways and another v Air Spain Ltd* 10 BLC (2005) 6114; *Canada Shipping and Trading S.A. v TT Katikaayu and another* 54 DLR (2002) 93;

party to an ICA with a seat outside Bangladesh from availing court ordered interim measures in relation to arbitral proceedings (under Section 7A of the 2001 Act which is based on Article 17J of the Model Law) or requesting a court to refer the parties to arbitration when the matter is subject of an arbitration agreement (under Sections 7 read with section 10 of the 2001 Act which is based on Article 8 and 9 of the Model Law). Hence, in an ICA with a seat in, say, London, an aggrieved party cannot seek injunction in Bangladesh, to prevent the defendant from alienating his assets, especially where a substantial portion of it is located in Bangladesh.

In this regard, a counter argument may be advanced that the rationale behind enactment of section 3(1) of the 2001 Act and the decision of the Appellate Division was to launch ICA in Bangladesh and to encourage having Bangladesh as a seat of arbitration. This argument has its limitations as the government of Bangladesh neither expressed any desire to that effect nor took any steps which supports the above argument. It is pertinent to note that after enactment of the 2001 Act on 24.01.2001 almost ten years passed but no positive steps were taken to set up or launch ICA facilitities in Bangladesh. It was only in 2011 that Bangladesh International Arbitration Centre (BIAC), the first international arbitration institution of the country was established. Moreover, given the progress made by Hong Kong, Malaysia and Singapore in attracting itslf as an ideal seat of arbitration in the Asia Pacific region, the above argument itself holds stale. In the absence of proper ground work relating to set up of ICA facilties in Bangladesh, section 3(1) is at best hindering the process of ICA. Being a hindrance, section 3(1) of the 2001 Act and its subsequent interpretation is sending wrong signals to the regime of ICA.

India

India enacted the Arbitration and Conciliation Act, 1996("the 1996 Act") to bring the law of arbitration in India in consonance with the international consensus reflected in the Model Law. Since its enactment, the Act has been a subject of significant amount of judicial interpretation.

1For the purpose of this paper, the focus is on the question of applicability of Part-I of the 1996 Act to arbitrations which have their seat outside India. Section 2(2) of the 1996 Act provides that Part-I shall apply where the place of arbitration is in India. The predominant view amongst the

various High Courts in India before the judgment in *Bhatia International*[84] was that Part-I, by virtue of S.2 (2), would not apply to arbitrations held outside India[85]. However, in *Bhatia International* the Supreme Court held that Part-I would apply to arbitrations held outside India unless its application is excluded. The question of applicability of Part-I is crucial since it contains certain important provisions which must be made available to international arbitrations held outside India for their smooth functioning, such as, the courts power to grant interim measures.

The question before the Supreme Court in *Bhatia International* was: Can a party in an arbitration being held outside India be allowed recourse to interim measures of protection from courts in India? In the 1996 Act, there is no provision akin to Article 1(2) of the Model Law and hence the Act had a structural lacuna, as it did not delineate which of its provisions are to apply even when the seat of the arbitration is outside India. The Supreme Court was faced with the unenviable task of interpreting a statue that had certain structural lacunae. The literal interpretation of S. 2 (2), as given by various High Courts, was resulting in hardship to parties to international arbitrations. The Supreme Court was forced to make up for this lacuna in the Act by placing an interpretation on S. 2(2) that the general principle of the Model Law is that courts of the seat of arbitration alone can perform functions of arbitral supervision including hearing any challenge to the award.

In the context of ICA, the Supreme Court gave the following interpretation to S. 2(2): In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement express or implied, exclude all or any of its provisions. The Supreme Court, therefore, rejected the interpretation of s.2(2) given by the Delhi High Court in cases like *Marriot* as, in the opinion of the Supreme Court, they resulted in inconsistencies, uncertainty and friction in the system of arbitration. The result was that parties in an arbitration held outside India would be free to approach the courts to seek interim measures of protection.

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[84] *Bhatia International v. Bulk Trading S.A*, (2002), AIR SC 1432

[85] In *Bhatia International* at Para 12 it is pointed out that the Orissa, Bombay, Madras, Delhi and Calcutta High Courts have held that Part-I of the 1996 Act would not apply to arbitrations which take place outside India. Some of these decisions are: *Marriot International Inc. v. Ansal Hotels Ltd*. AIR 2000 Delhi 377; *Biotechnology NV v. Unicorn GmbH Rahn Plastmaschinen* 1998 (47) DRJ 397; *Keventor Agro Ltd. v.Seagram Company Ltd.* 1998 CS No. 592 of 1997 dated 27.01.1998 (Cal).

Canada

After Canada acceded to the New York Convention in May 1986, the Federal Government passed the *United Nations Foreign Arbitral Awards Convention Act*, *1985,* which made the convention part of the law of Canada. The provinces followed suit and each passed legislation adopting the Convention as part of provincial law. In addition, the Federal Government became the first to adopt the Model Law. The Federal Government adopted the Model Law for all commercial arbitrations, whether domestic or international, which fall within the federal jurisdiction. The provinces again followed suit and enacted respective International Commercial Arbitration Act (ICAA) by incorporating the Model Law as a schedule to the ICAA so that the Model Law applies to arbitrations, which are inherently "commercial" in nature and "international" in scope[86].

The Model Law along with various other institutional arbitration rules considers granting of interim relief by a court as compatible with arbitration. It is for this reason that the Model Law and the ICAA recognize the role of the court in granting interim reliefs. In Ontario, a court may, under Article 9 of the Model Law read with Section 2(1) of the ICAA, grant interim measure of protection. *Article 9 of the Model Law* provides as follows:

*"**Article 9: Arbitration Agreement and Interim Measures by Court-** It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."*

Article 9 of the Model Law permits party to request from a court an "interim measure of protection" and for a court to grant such measure. Article 9 of the Model Law is applicable irrespective of whether or not the place of arbitration is in Canada[87]. Neither the Model Law nor any of the Canadian legislation on ICA indicates which measures of protection parties can request from a court. Article 9 of the Model Law only explains that such courts' orders are compatible with arbitration agreements. Common law courts have often ordered interim measures related to preventing transfer of assets, preserving the status quo, and taking and

[86] Arbitration Law of Canada: Practice and Procedure at 21;
[87] Article 1(2) of the Model Law

preserving evidence[88]. Interim measures available from court under Article 9 are generally broader than the interim measures that are available from arbitral tribunal under Article 17 of the Model Law. Additionally, unlike Article 17, court may order interim measure against third parties who are not privy to the arbitration agreement.

A party to an arbitration agreement may seek interim relief under Article 9 at any time before, during or after commencement of the arbitration[89]. The arbitral proceeding need not have commenced, so long as the applicant provides in the material that he or she intends to take the dispute to arbitration and needs the interim protection of the court in the meantime[90]. Moreover, Canadian Courts on numerous occasions have confirmed that in addition to Article 9 a court has inherent jurisdiction to grant an interim measure of protection notwithstanding the existence of an arbitration agreement[91]. The courts can also grant interim measure of protection under Article 9 notwithstanding any stay of proceedings granted by the court under Article 8(1) of the Model Law[92].

It is pertinent to mention that despite UNCITRAL's efforts to foster clarity, uniformity and harmonization through 2006 revision of the Model Law, no jurisdiction within Canada has yet implemented or adopted the 2006 Revision to the Model Law.

IV. HARMONIZATION AND "COURT-ORDERED INTERIM MEASURES" IN ICA

Assuming that the process of harmonization is not redundant within the concept of law, its meaning and justification are limited to the meaning and justifications for particular projects for harmonization. A project on harmonization of law is composed of four related features[93]: (a) conceptual and substantive diverse elements in the laws on "court-ordered interim measures" in

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[88] D.A. Redfern, "*Arbitration and the Courts: Interim Measures of Protection-Is the Tide about to Turn"*

[89] *Trade Fortune Inc. v Amalgamated Mill Supplies Ltd.* (1994), 24 C.P.C. (3d) 362 (B.C.S.C.)

[90] *Channel Tunnel Group v Balfour Beatty Ltd.* [1993] Adj.L.R. 01/21

[91] *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309 (B.C.C.A.); *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd* (1996) 2 S.C.R. 495

[92] *See Silver Standard Resources Inc Case, Supra* note 56

[93] *See* Martin Boodman, *supra* note 6, at 708

ICA in different jurisdictions which needs to be harmonized; (b) the rationale/justification for resolving this problem by harmonization, i.e. whether and why such diversity is problematic; (c) the ultimate goal of harmonization and whether the goal is legitimate; and (d) finally presents recommendation(s) for resolution of the problem, i.e. method by which the goal is to be achieved. It may be noted that these features are inter-related in that the perception of each has an impact upon the others. In this part of the paper, I shall apply the above methodology to the harmonization of law on "court-order interim Measures" in ICA.

A. NATURE AND DIVERSITY OF "COURT-ORDERED INTERIM MEASURES" IN BANGLADESH

While some degree of convergence of norms of international commercial has occurred due to formal harmonization efforts and the process of soft convergence, there are still many areas of continuing diversity in national approaches to ICA[94]. While the Model Law has been very influential in the reform of many national arbitration laws, it is fair to say that it has not resulted in the degree of harmonization and unification of arbitration procedure first envisaged by its drafters[95]. Despite the reduction of diversity as to appropriate level of liberalism to be granted to international arbitration, significant differences remain between national arbitration legislation[96]. Apart from some degree of harmonization on the conduct of the arbitration itself and the recognition and enforcement of subsequent arbitral awards, there is still national diversity in many areas, particularly in the level of judicial assistance rendered by national courts to the international arbitral process[97]. In this sense, the natural diversity of national legal systems and processes persist despite the pressure of globalization and the unifying measures of a commercial arbitration process. One area of divergence is discussed is more detail below: the granting of court ordered interim measures within ICA.

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[94] *See* Alan Shilston, *Cultural Diversity in Common Arbitral Practice,* [Nov.1989] Arb.J.260, 262;

[95] *See* discussion in Arthur Marriott, *England, in* XII Yearbook Commercial Arbitration 369 (1996)

[96] *See* Fouchard Gaillard Goldman, *supra* note 34

[97] *See* comments made by Craig, *supra* note 33, at 58; Guillermo Aguilar Alvarez, *To What Extent Do Arbitrators in International Cases Disregard the bag & Baggage of National Systems,* Is there a Growing International Arbitration Culture?, ICCA Congress Series No.8 139 (Albert Ven Den Berg ed. 1996);

As stated earlier, none of the international conventions on ICA has provisions regulating the regime of interim measures. Article II (3) of the New York Convention only ensures that agreements to arbitrate will be respected by the national courts and enable them to pass an interim order to refer the dispute to arbitration. Apart from the above power of court to grant interim order during or before arbitration proceedings, this issue is mostly regulated by national legislations and institutional rules. As a result, UNCITRAL revised the original Model Law by inserting a new chapter IVA "*Interim Measures and Preliminary Orders"* to conform to current practices in international trade. It is pertinent to mention that Article 9 of the Model Law read with Paragraph 21, 22 and 30 of the Explanatory Note puts it beyond any doubt that existence of an arbitration agreement does not infringe on the power of the court to order interim measures. Further, Article 17J read with Article 1(2) of the Model Law provides that national courts in all jurisdictions can exercise the power of interim measures of protection notwithstanding the seat of arbitration.

In countries that adopted the 2006 reform, national courts have the power to issue interim measures in relation to arbitration proceeding "*irrespective of whether their place is in the territory of this state.*"[98] On the other hand, countries, which have not adopted the Model Law, allow their national legislation to determine whether the court has the previously mentioned power notwithstanding the place of arbitration. The latter situation can give rise to diversity among national arbitration legislations on the issue of "court-ordered interim measure" which may have severe consequences in outcome of the arbitration proceeding or enforcing the arbitral award. For example, in some countries like Bangladesh, which did not adopt the 2006 Reform of the Model Law, the national arbitration legislations contain provisions, which allow national courts to grant interim relief ***only if the place of arbitration is in the territory of that state***. Hence, in an ICA with a seat in, say, London, an aggrieved party cannot seek injunction from national court of a non-model country (like Bangladesh) to prevent the defendant from alienating his assets, especially where a substantial portion of it is located in the territory of that State. However, the defendant would be able seek similar interim relief from its national court if he belongs to a Model Law country (such as Canada) or the national court of that country interprets

[98] See Article 17I read with Article 1(2) of the UNCITRAL Model Law;

the national arbitration law to ensure harmony with the Model Law notwithstanding textual diversity (such as India). In short, in case of dispute in relation a transaction between investors in Bangladesh and India or Bangladesh and Canada, with seat of arbitration being London or Singapore, the investors from Bangladesh cannot obtain order from its national court preventing the investors from Canada/India from alienating his assets in Bangladesh. However, with respect to the same transaction, investors from Canada and India will be able to obtain interim measures of protection from its national court against its counterpart.

The above diversity may further lead to any of the following problems:

(i) Party to an arbitration agreement will not be able to obtain interim measures against third parties due to lack of competence of the tribunals.

(ii) Parties to arbitration also face difficulties when one party seeks interim relief at an early stage of the proceeding. In arbitration, it is typically difficult to obtain such relief expeditiously because the arbitral tribunal has not yet been constituted[99]. As a result, a party in need of provisional relief can obtain it only in the regular courts. If a party seeks to delay the opposing party's request for an injunction or an attachment, that party can slow the process considerably by taking a long time to select an arbitrator. There are times when parties need immediate recourse, i.e. to enjoy an imminent action, and the arbitration procedure simple does not accommodate this need[100].

B. *RATIONALE/JUSTIFICATIONS FOR RESOLVING THE DIVERSITY THROUGH HARMONIZATION*

As stated previously, harmonization of law is only intelligible as a means of solving a particular legal problem. The nature of the problem or rationale for harmonization is the primary element because it determines the goal or meaning of harmonization and the means or model for achieving the goal. In this section I propose to outline, albeit briefly, the reasons that might make harmonization of differing national laws on "court-ordered interim measures" desirable. Given the space constraint, I will not be considering the principal objection against such arguments as

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[99] *See* Larence W. Newman, *International Arbitration Unfinished Business,* 225 N.Y.L.J., Apr.3, 2001, at 156

[100] *See* Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs, and Commentary on the WIPO Emergency Relief Rules (In Toto),* 9Am. Rev Int'l Arb.155 (1998).

they have been discussed in brief under Part II. The primary purpose of this section is to ascertain whether harmonization of national law on court ordered interim measures in ICA is a meaningful and justifiable goal for law reform.

The rationale for proposal for harmonization and unification of national law on "court ordered interim measures" is threefold, namely: (a) providing a jurisdictional interface to enable parties from different systems to interact or communicate; (b) fairness in international transactions and international trade competition; (c) economies of scale[101] and political economies of scale.

Jurisdictional Interface

One of the most important functions of harmonization is to enable participants from different jurisdictions to interact or communicate[102]. This interface claim for harmonization is limited to cases in which transaction occurs directly between two jurisdictions. Even if harmonization of the legal regime on interim measures in ICA is not considered necessary, it will simply be more efficient as it would avoid uncertainty and transaction costs in international transactions[103]. The overstated interface claim is sometimes presented, either descriptively or normatively, as the "globalization" of law.[104] Because there are more transactions that are international, the claim is that there is a greater need for harmonization of law. Moreover, this would also help increase effectiveness of ICA by ensuring arbitration agreement is respected and any award passed in the arbitral proceedings is capable of being enforced.

The most common economic justification given for the need to harmonize ICA is the need to provide a jurisdictional interface for parties from different jurisdictions engaged in international commercial transactions to avoid uncertainty and increased transaction costs in international

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[101] *See* Lynch, *supra* note 1, at 200
[102] *See* Leebron, *supra* note 8, at 52
[103] *See* Zweigert and Kotz (1992, p.23)
[104] *See* generally *Symposium: Globalization of Law* (1993)

transactions[105]. The aim is to limit the differences between national arbitration laws and therefore, reduce the uncertainty associated with the multiplicity of arbitral regimes. This is based on normative assertion that the difference in national arbitration laws and policies must be reduced in order to reduce uncertainty and risk and thus the cost of cross-border transactions. The notion of harmonization of laws is considered desirable because it will reduce the costs of transacting inter-jurisdictional businesses that are increased by diversity of legal rules[106]. This reflects the implicit assumption that with increasing globalization in international trade, there should be increased similarity in national laws or the harmonization of `transactional interfaces`. It is important to note, however, that in most cases, the claim for harmonization is based on the notion of increased efficiency rather than necessity, i.e. harmonization is not strictly necessary, as the transaction will still occur without harmonization[107].

Fair Competition

A prevalent argument in support of harmonization of laws is fairness in trade competition-what Alan Redfern and Martin Hunter refer to in the context of ICA as the notion of 'level playing field'. The central idea is that divergent national laws on court ordered interim measures might give a party to an arbitration *unfair* advantage in the arbitral process if it belongs to a Model Law country or a country whose national court is prepared to issue interim orders notwithstanding the place of arbitration. This claim asserts that there is something inherently wrong about the difference in the legal regime of ICA relating to court ordered interim measures.

The fairness claim for harmonization usually comprises both an economic claim and an argument about justice. The underlying economic claim is that the differences in legal regime distort conditions of competition. In other words, the comparative advantage that results from regulatory differences is asserted not to be a "real" comparative advantage. The point being proponents of fairness claims usually support the notion of economic competition, so long as

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[105] *See* Leebron, *supra note 149, at 53*

[106] However, it is not necessarily true that the absence of uniformity or harmonizing in laws significantly increases the costs of inter-jurisdiction business. *See* discussion of this issue in Boodman, *supra* note 151, at 705.

[107] The adoption of similar or identical domestic rules is rarely *required. See* discussion of this point in Leebron, *supra* note 149, at 52.

such competition is "fair". The claim relating to justice suggests that since competition is unfair, it is also unfair that other competitors in international trade shoulder the costs of such unfair competition[108].

Economies of Scale

Another argument put forth for harmonization is economies of scale. The rationale is that harmonization is desirable because it will reduce the costs of doing business, which are increased by diversity` in legal rules. In international transaction legal cost represents an additional fixed costs and thus difference between legal systems create barrier to trade. Harmonization of the diversity between national legal systems substantially reduces information costs, enabling market entrance for even small transactions. These economic of scale argument can also be cast as fairness argument in that it may create 'artificial' source of competitive advantage enjoyed by domestic markets. Further, the diversity in the law may also detract foreign investors from investing in least developed countries (LDC) like Bangladesh due to the nature of the national law, which does not support resolution of dispute through arbitration.

Political Economies of Scale

A slightly different justification for harmonization is that of political economies of scale referring to the notion that political forces and institutions involved in the process of harmonization might realize certain economies, or greater efficiency, if decisions were made or influenced by a more encompassing forum- a vertical forum shift is a shift to a larger or smaller geographical jurisdiction, such as from a national to international forum[109]. Many international institutions of harmonization do not enjoy any hierarchical power over national institutions, however, which then make the independent political decision as to whether to accept or reject harmonization[110]. Harmonization does entail at least a partial vertical forum shift due to the necessity of coordinating the regulatory policies of different jurisdictions[111].

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[108] *See* Lynch, *supra* note1, at 202

[109] *See* Leebron, *supra* note 8, at 65.

[110] *See* Leebron, *supra* note 8, at 64.

[111] *See* Lynch, *supra* note 1, at 203

C. GOAL OF HARMONIZATION AND LEGITIMACY OF DIFFERENCE

There are many varied and complex reasons why there are differences between national legal systems. These include distribution of political power, economic systems, institutional structures, religious and ethical values, organization of authority, degree of development and industrialization. The underlying assumption of harmonization is the need to reduce, even eliminate, domestic diversity among nations seeking freer trade. Ultimately, the notion of harmonization requires an evaluation of the legitimacy of differences between nation states.

Harmonization claim cannot be evaluated solely with respect to the goals that harmonization is designed to achieve, such as economies of scale or fairness. Differences among nations may also have value, and harmonization can only be achieved at the cost of eliminating or reducing differences. Ultimately, the question of harmonization, particularly where the justification is fairness, is one of the legitimacy of difference[112]. If differences are legitimate, then a harmonization claim could not be based solely on the existence of difference, as the fairness claims appears to be. If differences have value in addition to the legitimacy, then even harmonization claims based on these other arguments must consider those in determining whether harmonization should be pursued.

Difference between national regulatory policies could be regarded as either substantively legitimate or procedurally legitimate. The question of why nations adopt different laws is an extraordinarily complex and difficult inquiry, one that would require all the tools and insights of the sociology of law, public-choice theory. Following Leebron, I would like adopt a more limited and abstract approach. Without going into details of the legitimacy of the difference, it is reasonably safe to say that difference in respect of court ordered interim measures has little or no value as it runs the risk of rendering the entire process of ICA redundant. Hence, without ascertaining the legitimacy of the difference, this thesis recommends removal of the said diversity by adopting any one of the two models set out below.

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[112] *See* Leebron, *supra note* 13, *at 66*

D. RECOMMENDATIONS

The final element in the analysis of harmonization of court ordered interim measures in ICA is the model for harmonization. In principle, a model for law reform should represent the best of many possible solutions to a particular problem. As indicated by the methodology applied in this paper, to be meaningful the choice of a model requires a thorough investigation of the substantive and theoretical aspects of the problem and its solution from an internal and comparative perspective.

As stated earlier, interim measures of protection are critical to the facilitation of dispute resolution in every legal system[113]. Interim relief, or the lack thereof, can have a substantial or even determinative effect on the outcome of any case, whether submitted to litigation or arbitration. There is currently no uniform practice in granting court ordered interim relief in arbitration[114]. National laws differ significantly on the scope of the national courts' power to grant interim relief. This lack of clarity and similarity raises concerns about predictability and enforcement[115]. These concerns, if left unanswered, could have serious implications for the future arbitrations given that the success of arbitration is dependent on the satisfaction of parties and their confidence in the mechanism[116]. In the discussion that follows, I propose any of the following recommendation.

(a) States Should Incorporate 2006 Reform Of The Model Law Into National Arbitration Laws

As the processes and standard for the conduction of arbitration have evolved and developed over time, so too have national arbitration laws. States' responses to the development of arbitration

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[113] *See* UNCITRAL Working Group on Arbitration, *Possible Future Work: Court Ordered Interim Measures of Protection in Support of Arbitration, Scope of Interim Measures That May be Issued by Arbitral Tribunals, Validity of Agreement to Arbitrate, Report of the Secretary General,* delivered to the General Assembly, UN Doc. A/CN.9/WG.111 (Oct.12, 2000)

[114] *See* William Wang, "International Arbitration: The Need for Uniform Interim Measures of Relief" 28 Brook. J. Int'l L.1059 at 1075

[115] *See* Richard W. Naimark & Stephanie E. Keer, *Analysis of UNCITRAL Questionnaires on Interim Relief,* 16-3 Mealey's Int'l Arb. Rep.11 (2001) at 11. \

[116] *See* Guiseppe De palo & Linda Costabile, Promotion of International Commercial Arbitration and Alternative Dispute resolution Techniques in Ten Southern Mediterranean Countries, 7 Cardozo J. Conflict Resol. 303, 304 (2006) (asserting that country benefit from confidence of investors in arbitration)

laws should account for advancements in model legislation regarding interim relief, particularly court ordered interim relief[117]. To date, Mauritius, Slovenia, New Zealand, and Peru incorporated the Model Law amendments into their national law[118]. By following suit and codifying the amendments to Article 17 (including Article 17J read with Article 1(2)), other states will facilitate the resolution of international commercial disputes by harmonizing arbitration legislation, increasing confidence in ICA as a dispute resolution mechanism and making all states equally attractive as seats for arbitral disputes.

Unfortunately, despite widespread support for the amendment within UNCITRAL, the majority of states have not yet seriously considered the incorporation of the 2006 amendments into national law[119]. States like Bangladesh that do not wish to incorporate the 2006 reform fully should consider incorporating at least those provisions that are uncontroversial as a first step in achieving greater harmonization. In short, since one of the main objection of national states have always been lack of participation of national court in the arbitral process, it should feel free to adopt Article 17J read with amended Article 1(2) as it the most uncontroversial provision of the lot.

(b) Amendment of the New York Convention

New York Convention is silent on judicial authority to grant pre-award attachments and other interim measures. Because there are no express provisions in the Convention regarding the competence of courts to grant interim measures in aid of foreign arbitration, it is an open question whether national courts are competent to grant pre-award attachment in aid of foreign

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[117] *See* Jean-Francois Poudret & Sebastien Besson**,** Comparative Law of International Arbitration 905 (2d ed. 2007) (insisting that harmonization between the courts and arbitrators alone is insufficient for effective arbitration and advocating for a harmonization among states in arbitration matters).

[118] *See* UNCITRAL, *Status of Conventions and Model Laws, Note by the Secretariat, 5, delivered to the General Assembly,* U.N. Doc. AICN.9/674 (May 14, 2009) [hereinafter *Status of Model Law]* (indicating that only four states have enacted legislation based on the 2006 Model Law provisions on interim measures, significantly lower than the number of states that incorporated the previous 1985 version of Article 17).

[119] UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-Second Session, 64, delivered to the General Assembly, U.N. Doc. A/CN.9/468 (Apr. 10, 2000) [hereinafter Report of the Thirty-Second Session]

arbitrations[120]. According to one commentator, "by spinning a web of conflicting precedent and inexplicable exceptions" on this issue "U.S. courts have increased the cost of private dispute resolution in international transactions."[121] Such criticisms of the Convention have led to radical proposals for improvement of the international enforcement regime for arbitration agreements and awards. Most notably, in 1993, Judges Howard M. Holtzmann and Stephen M. Schwebel advocated the creation of an International Court of Arbitral Awards with exclusive jurisdiction to determine whether recognition and enforcement of an international award could be refused under the New York Convention[122], while in June 2008, the foremost authority on the Convention, Professor Albert Jan van den Berg, proposed a "modernization" of the Convention.

Recently, after 50 years of its existence, Albert Van Den Berg surprisingly suggested that the New York Convention is in need of modernization[123]. The preliminary Draft Convention on International Enforcement of Arbitration Agreement and Awards ("the Draft Convention") is intended to achieve modernization in respect of various issues such as definition of the scope of application with respect to agreements that fall under the referral provisions of article II (3), a waiver of a party to rely on a ground for refusal of enforcement etc. The Draft Convention intends to address the shortcoming in the New York Conventions (specified in the draft Convention) since it cannot be remedied by the Model law, as revised in 2006. The Draft Convention does not address issues relating to interim measures particularly court ordered interim measures. This paper does not purport to analyze the shortcomings of the New York Conventions as suggested by Van Den Bergs and comment on his claims for modernization. Instead, it proposes that since modernization of New York Convention is being considered for

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120 *See* Albert Jan van den Berg, The New York Convention of 1958: An Overview 1, 17 (June 6, 2008), http://www.arbitration-icca.org/articles.html (last visited July 23, 2008), at 12

121 *Ibid*

122 See Charles N. Brower, Keynote Address at Premier Arbitration Conference, 13 World Arb. & Mediation Rep. 270, 271 (2002), citing Howard M. Holtzmann, A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards, in The Internationalization of International Arbitration, the LCIA Centenary Conference 111 (Martin Hunter et al. eds., 1995)

123 Albert Jan van den Berg, Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards, Explanatory Note

various reasons, it is high time that such modernization claims also ensure harmonization of court ordered interim measures in national law.

The main argument advanced in this paper is that development and effectiveness of ICA necessitates harmonization of national laws on the issue of "court ordered interim measures". In particular, it argues that globalization, increased level of international trade and the transnational order of the international arbitral regime requires that harmonization of national law on "*court ordered interim measures*" must be ensured through enactment of formal international convention concluded by states and the subsequent implementation of such conventions into national law instead of waiting for the national States to adopt the non-mandatory 2006 Reform of the Model Law.

Although the Model Law contain provisions relating to court ordered interim measures, it is necessary to amend the New York Convention to include a specific provision mandating courts of nation bound by treaty to recognize that it is capable of passing interim relief notwithstanding the place of arbitration. Such an amendment would resolve conflict in states like Bangladesh where the courts have declined to grant interim relief before or during arbitral proceedings if the place of arbitration is outside the territory of that state. This would also ensure that the legislatures should take necessary time for making necessary changes.

CONCLUSION

Although interim measures of protection in arbitration have come a long way in recent times and the use of interim measures has proliferated, it is necessary to continue to refine and alter the system to meet the needs of today's ever-changing world of business. To make arbitration effective, it is necessary to implement some mechanism that can ensure that interim measures can be appropriately granted and enforced.

BIBLIOGRAPHY

LEGISLATION

Indian Arbitration and Conciliation Act, 1956

Bangladesh Arbitration Act, 2001

United Nation Convention on the Recognition of and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T.2517, 30 U.N.T.S. 3(1958)

JURISPRUDENCE

Silver Standard Resources Inc. v. Joint Stock Co. Geolog, (1998), 168 D.L.R. (4th) 309 (B.C.C.A.)

Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC, (2008) 305 D.L.R. (4th) 432; 2008 ONCA 872

Unicol Bangladesh Blocks Thirteen and Fourteen v Maxwell Engineering Works Limited and another, 56 DLR (AD) (2004)166

Bhatia International v. Bulk Trading S.A, (2002), AIR SC 1432

Marriot International Inc. v. Ansal Hotels Ltd. AIR 2000 Delhi 377

Biotechnology NV v. Unicorn GmbH Rahn Plastmaschinen 1998 (47) DRJ 397

Keventor Agro Ltd. v.Seagram Company Ltd. 1998 CS No. 592 of 1997 dated 27.01.1998 (Cal).

Trade Fortune Inc. v Amalgamated Mill Supplies Ltd. (1994), 24 C.P.C. (3d) 362 (B.C.S.C.)

Channel Tunnel Group v Balfour Beatty Ltd. [1993] Adj.L.R. 01/21

Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd (1996)

SECONDARY MATERIAL: MONOGRAPHS

Lynch, Katherine, *The Forces Of Economic Globalization: Challenges To The Regime Of International Commercial Arbitration* (Kluwer Law International, 2003).

Redfern, Alan & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Oxford University Press, 3rd Ed., 1999)

Konrad Zweigert & Hein Kotz, *Introduction to Comparative Law* (Oxford University Press, USA 3rd ed., 1998).

Klaus Peter Berger, *The Creeping Codification Of Lex Mercatoria* (Kluwer Law International, 1999).

O. Chukwumerije, *Choice of Law in International Commercial Arbitration,* (Quorum. Books, 1994)

Gary B. Born, *International Commercial Arbitration in The United States Commentary & Materials* (Deventer; Boston: Kluwer Law and Taxation Publishers, 1994).

J Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (JurisNet, LLC 2005)

SECONDARY MATERIAL: ARTICLES

William Wang, Note, "International Arbitration: The Need for Uniform Interim Measures of Relief" (2003) 28 BROOK. J. INT'L L. 1059.

Christopher R. Drahozal, "Commercial Norms, Commercial Codes, and International Commercial Arbitration" (2000) 33 Vand. J. Transnat'l L. 79

Boodman, Martin, "The Myth of Harmonization of Laws" (1991) 39 Am. J. Comp. L.699.

Bhagwati, Jagdish "The Demands to reduce Domestic Diversity among Trading Nations" in Fair Trade and Harmonization: Pre Requisite For Free Trade 41 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996).

David W Leebron, "Lying Down with the Procrustes: An Analysis of Harmonization Claims" in Fair Trade and Harmonization: Pre Requisite for Free Trade? (Jagdish N. Bhagwati & Robert E. Hudee eds., 1996)

David W Leebron, "Seoul Conference on International Trade Law: Integration, Harmonization and Globalization*"* (1996) 10:2 COL.J.ASIAN L.305, 309

Lord Goff, *Windows on the World, in* International Commercial Arbitration For Today and Tomorrow 52 (John Tackaberry ed., 1991)

Bertil Ohlin, "Some Aspects of Policies for Freer Trade" in Trade, Growth, and Balance of Payments: Essays in Honor of Gottfried Haberler 83 (R.E. Baldwin et al. eds. 1965)

Michael J Bonnell, "International Uniformity in Practice- Or Where the Real Trouble Begins" (1990) 38 Am J Comp L.865

Roy Goode, "The Role of the UK in Common Law: Insularity or Leadership*?*" (2001) 50 Int'l & Comp. L.Q.751

C. Schmithoff, "The Unification or Harmonization of Law by Means of Standard Form of Contracts and General Conditions*"* (2001) 17 Int'l & Comp. L.Q.751

V. Pechota, "The Future of the Law Governing International Arbitral Process: Unification and Beyond" (1992) 3:1 Am Rev. Int'l Arb. 17, 19-20.

W. Laurence Craig, "Some Trends and Developments in the Law and Practice of International Commercial Arbitration" (1995) 30 tex. Int'l L.J. 1 at 25.

Fouchard Gaillard Goldman on International Commercial Arbitration 47 (Emnanul Gaillad Goldman and John Sarage eds., 1999), at 21.

Report on the United Nations commission on International Trade Law on the work of its 18th Session -3-21 June 1985, UN GAOR, 40th Sess. Supp. No.17, U.N.Doc.A/40/17 (August 21, 1985)

G Hermann, *The UNCITAL Arbitration Laws: A Good Model of a Model Law,* 3:2 UNIFORM L. REV. 483, 485 (1998)

Peters Sanders, Quo Vadis Arbitration? *See also* Charlotte L Bynum, *International Commercial Arbitration,* ASIL Guide to Electronic Resources for International Law (Mar.2001), *at* http://asil.org/resource/arb1.htm

Peter Fromuth & Ruth Raymond, "UN Personell Policy Issues in United Nations Management and Decision Making Project" (1987)

Douglas Williams, "The Specialized Agencies and the United Nations" (1987)

Howard M Holtzmann & Joseph E Neuhaus, "A Guide to the UNCITRAL Model Law International Commercial Arbitration: Legislative History and Commentary" (1989)

K. Lionnet, "Should the Procedural Law Applicable to International Arbitration be Denationalized or Unified? The Answer of the Model Law", (1991) 8:3 Int'l Arb. 5

G. Hermann, "The Role of the Court under the UNCITRAL Model Law Script" at 166

J. Gillis Wetter, "The Present Status of the International Court of Arbitration of the ICC: An Appraisa*l*" (1990) 1 Am. Rev. Int'l Arb. 91

Raymond J. Werbicki, "Arbitral Interim Measures: Fact or Fiction?" (2002) 57-Jan. Disp. Resol. J. 62

Richard W. Naimark and Stephanie E. Keer, "Analysis of UNCITRAL Questionnaires on Interim Relief, Global Center for Dispute Resolution Research"(March 2001) available at www.globalcenteradr.com

UNCITRAL, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, Report of the Secretariat, 42, delivered to the General Assembly, U.N. Doc. A/CN.9/264 (Mar. 25, 1985);

D.A. Redfern, "Arbitration and the Courts: Interim Measures of Protection-Is the Tide about to Turn"

Alan Shilston, "Cultural Diversity in Common Arbitral Practice*",* [Nov.1989] Arb.J.260, 262;

Guillermo Aguilar Alvarez, *To What Extent Do Arbitrators in International Cases Disregard the bag & Baggage of National Systems,* Is there a Growing International Arbitration Culture?, ICCA Congress Series No.8 139 (Albert Ven Den Berg ed. 1996);

Larence W. Newman, "International Arbitration Unfinished Business"*,* 225 N.Y.L.J., Apr.3,2001

Richard Allan Horning, "Interim Measures of Protection; Security for Claims and Costs, and Commentary on the WIPO Emergency Relief Rules (In Toto)"*,* 9Am. Rev Int'l Arb.155 (1998)

UNCITRAL Working Group on Arbitration, *Possible Future Work: Court Ordered Interim Measures of Protection in Support of Arbitration, Scope of Interim Measures That May be Issued by Arbitral Tribunals, Validity of Agreement to Arbitrate, Report of the Secretary General,* delivered to the General Assembly, UN Doc. A/CN.9/WG.111 (Oct.12, 2000)

William Wang, "International Arbitration: The Need for Uniform Interim Measures of Relief" 28 Brook. J. Int'l L.1059 at 1075

Richard W. Naimark & Stephanie E. Keer, "Analysis of UNCITRAL Questionnaires on Interim Relief*",* 16-3 Mealey's Int'l Arb. Rep.11 (2001) at 11.

Guiseppe De palo & Linda Costabile, Promotion of International Commercial Arbitration and Alternative Dispute resolution Techniques in Ten Southern Mediterranean Countries, 7 Cardozo J. Conflict Resol. 303, 304 (2006)

Jean-Francois Poudret & Sebastien Besson**,** Comparative Law of International Arbitration 905 (2d ed. 2007)

UNCITRAL, *Status of Conventions and Model Laws, Note by the Secretariat, 5, delivered to the General Assembly,* U.N. Doc. AICN.9/674 (May 14, 2009)

UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-Second Session, 64, delivered to the General Assembly, U.N. Doc. A/CN.9/468 (Apr. 10, 2000)

Albert Jan van den Berg, The New York Convention of 1958: An Overview 1, 17 (June 6, 2008), http://www.arbitration-icca.org/articles.html (last visited July 23, 2008), at 12

Charles N. Brower, Keynote Address at Premier Arbitration Conference, 13 World Arb. & Mediation Rep. 270, 271 (2002), citing Howard M. Holtzmann, A Task for the 21st

Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards, in The Internationalization of International Arbitration, the LCIA Centenary Conference 111 (Martin Hunter et al. eds., 1995)

Albert Jan van den Berg, "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards, Explanatory Note"