The success of an international arbitration would require some assistance or intervention of the national courts. This situation is not only limited to other jurisdiction but also applies to the courts of Sierra Leone. What circumstances would necessitate such assistance or intervention?

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INTERNATIONAL ARBITRATION AS A FAST VEHICLE THAT CAN ONLY RUN WHEN IT HAS THE WHEELS OF NATIONAL COURT'S INTERVENTION AND ASSITANCE

1. INTRODUCTION

a. The Relationship between International Arbitration and National courts

Just as the prevalence of the weather, the involvement of national courts in international arbitration is rather obvious because national laws are permissive and parties invite or encourage them to do so.[1] The two decision makers have an interesting relationship that swings between forced cohabitation and true partnership. Arbitration is dependent on the underlying support of the courts, which alone have the power to rescue the system when one party seeks to sabotage it. According to (Lord Mustill) in COPPEE LEVALIN NV V KENREN FERTILISERS AND CHEMICALS [1994][2], this relationship builds a tension. "*On the one hand the concept of arbitration as a consensus process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side…it is only a Court possessing Coercive powers which could rescue the arbitration if it is in danger of foundering."*

A party who agrees to refer disputes to arbitration chooses a private system of justice and this in itself raises issues of public policy. This freedom of contract is but limited to only 'arbitrable' disputes as often prescribed by the State that then enforces these boundaries through its courts. The state also determines other limitations upon the arbitral process: whether, for instance, arbitrators have the power to compel the attendance of witnesses or the disclosure of documents, and more importantly, whether or not any appeal to the national court is possible, and if so, how, when, and upon what terms. In Sierra Leone, Cap 25 of the Laws of Sierra Leone, 1960 (hereinafter "Cap 25") without more spells out very narrow limits within which arbitral tribunals can operate.

The partnership that exists between national courts and arbitral tribunals is not one of equals[3] because the agreement of the parties though fundamental to the authority of the tribunal would be baseless without a system built on law, which relies upon that law to make it effective both nationally and internationally. Lord Mustill, in 'Comments and conclusions', in International Chamber of Commerce (ICC) (ed) Conservatory Provisional Measures in International Arbitration[4], would regard this partnership as 'a relay race,' where, 'in the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is

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[1] See Richard Allan Horning, Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (in Toto): Article 46, 9 AM. REV. INT'L ARB. 155, 156 (1998)

[2] 2 Llyod's Rep 109 (HL), at 116

[3] Goldman puts in The Complementary Role of Judges and Arbitrators, ICC PUBLICATION NO. 412 (ICC), 1984), p. 259

[4] 9th Joint Colloquium (ICC, 1993), p. 118]

no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge, they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award. This is true in paper but in practice, the respective domains of arbitral tribunals and national courts may not be so clearly distinguished.

Arbitration being a court decongestion strategy[5], the preference of it as a means of resolving international disputes involving states, individuals, and corporations is increasing the distance between the arbitral process and the risk of domestic judicial parochialism. Regardless, the involvement of national courts in the international arbitration process remains essential to its effectiveness. The ever-increasing trend to seek interim measures has placed a renewed focus on the respective roles of the arbitral tribunal and the courts.

Thus, there are limitations to the independence of arbitration. Even the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Model Law that seems to exclude the involvement of the courts as far as possible, still regards the participation of the 'competent court' in carrying out 'certain functions of arbitration assistance and supervision'.

2. **Sierra Leone's Statutory Framework**

The current Arbitration Act Cap 25 makes no express provision for international arbitration proceedings. However, pursuant to Section 5 of Cap 25, the Court is enabled to stay the proceedings and give effect the intention of the contracting parties if Court proceedings are issued in breach of an international arbitration agreement. Although the current act outdated Act is not based on the UNCITRAL model, parties are, nevertheless, able to elect international arbitration using internationally recognised rules. Sierra Leone is a signatory to UNCITRAL and the Investment Promotions Act, 2004 just like the Petroleum (Exploration and Production) Act, 2011 provides for arbitration under the UNCITRAL rules, in the event of a dispute between an investor and the Government of Sierra Leone. For this reason, the UNCITRAL which Justice Glena Thompson indicated[6] to be the most commonly used is extensively relied on in this work. The Public Private Partnership Act, 2014 similarly provides for international arbitration, in the event of a dispute between a contracting authority and a private partner. A draft Arbitration Bill based on UNCITRAL is currently being considered by the Law Reform Commission.

Sierra Leone through its Parliament has since 9th November, 2018 ratified the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention).

The Sierra Leone Chamber of Commerce, Industry and Agriculture runs the Centre for Alternative Dispute Resolution, with the aim to encourage judges to refer matters in the High Court that are

[5] The Sierra Leone Judiciary's Strategic Plan 2016-2021

[6] Arbitration Procedures and practice in Sierra Leone: overview; Law stated as at01-Nov-2015 – https://uk.practicallaw.thomsonreuters.com/3-619-86006?transationType=Default&contextData=(sc.Default)

suitable for ADR, develop its own rules based on the UNICITRAL model and record certain aspects of the arbitration process for the purpose of developing a precedent base.

Although hardly discussed by lawyers or legal academics in Sierra Leone, one must be guided that Cap 25, pursuant to section 4 of Cap 223 of the Laws of Sierra Leone, 1960 [The Trade Disputes (Arbitration and Inquiry) Act] does not apply to any proceedings of an Arbitration Tribunal under the said Cap 223 or to any award issued by it. However, I am also tempted to also ignore it, for the scope of this research is principally international arbitration to which Cap 223 is irrelevant.

3. Categories of the Intervention and Assistance of the National Court

In Lunar Trading v Phillip Morris Senegal, Justice Edwards as he then was categorically identified the different duties of the court. He would say: "By being the court with supervising and supportive powers it means a court that could exercise firstly, **pre-arbitration** powers like stay of proceedings, interim measures the constitution of the arbitral tribunal etc; secondly, powers **during the arbitration** like extension of time, powers in relation to constitution of the tribunal, determination of disputes about the tribunal's jurisdiction, interim measures, coercive powers re-witnesses etc and thirdly, powers **after arbitration** like setting aside the award where the award was made or enforcing the award where enforcement is made." This categorisation is accepted by Redfern and Hunter on International Arbitration, Student Version, Sixth Edition.

(i) At the Beginning of the Arbitration (Pre-Arbitration)
(ii) During the Arbitral Proceedings
(iii) At the End of Arbitration

(I) AT THE BEGINNING OF THE ARBITRATION

There are three sub-heads under this category:

a. the enforcement of the arbitration agreement;
b. the establishment of the tribunal; and
c. challenges to jurisdiction.

a. **Enforcing the arbitration agreement** - According to section 3 of the Arbitration Act (CAP 25), a submission is binding between the parties and the courts (of Contracting/Member States)[7] should, when confronted with a matter in respect of which the parties have entered into an arbitration agreement in writing, give effect to them and at the request of a party to the agreement stay proceedings (brought in breach of that valid agreement) pursuant to section 5 of the Act and refer the dispute to arbitration unless it deems the agreement to be invalid, inoperative or incapable of being performed. An examination by Imran Khan in his article of April 28, 2017 titled "Charting a New Path to Commercial Arbitration: Sierra Leone to Accede to the New York Convention"[8] suggests that section 5 of Cap 25 has a strict waiver rule according to which any

[7] Art II of the New York Convention makes similar provisions
[8] http://arbitrationblog.kluwerarbitration.com/2017/04/28/charting-a-new-path-to-commercial-arbitration-sierra-leone-to-accede-to-the-new-york-convention/

procedural step taken after filing an appearance to a judicial action is deemed to be a waiver of the intention to arbitrate. This position is maintained in Atkins Encyclopedia of Court Forms, [9], adding the requirement that there must be a dispute between the parties with regard to the matter referred to. The Sierra Leone Court of Appeal has recently confirmed this in **TIMIS MINING CORPORATION (SL) LIMITED V CAPE LAMBERT RESOURCES LIMITED, GRAIG DEEN, GERALD METALS LIMITED AND FRANK TIMIS [2021][10]**, where Justice Sengu Koroma presiding observed that "*this provision is useful to both domestic or non-domestic (i.e. international) arbitration*…" In the said case, the Court had to consider whether the trial Judge was right to have ordered the parties to proceed to arbitration while failing to grant a stay. The presiding judge at paragraph 41 observed that allowing the parties to proceed to arbitration whilst at the same time refusing a stay would cruelly starve the interest of justice. He relied on **LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND** in which Sr. Michael J. Mustill and Stewart C Boyd at page 123 argued that: '*Where the claimant institutes an action in the court, unless and until an application is made to stay the action, the jurisdiction of the Courts takes effect in full, the action proceeds in precisely the said way as if there had been no arbitration agreement; and equally, the judgment of the court is unconditionally binding on the parties. Until the court decides to grant a stay, it is the action which is the medium for determining the dispute since there cannot be two tribunals with co-existent powers to make binding decisions as to the rights of the parties*.' This is described as "Anti-Suit Injunctions" by Julian D M Lew in his article[11] titled "**Does the National Court Involvement Undermine the International Arbitration Process?**" Anti-suit injunctions operate in personam preventing or restraining proceedings in courts in breach of an arbitration agreement. Such injunctions are typical when there are concurrent proceedings in another jurisdiction. The anti-suit injunction is not directed at the foreign court but at the defendant who has promised, through the arbitration clause, not to bring foreign proceedings.

According to Mr. Osman Jalloh[12] the courts of Sierra Leone have even prior to the country becoming a party to the Convention been on occasions deferring and referring to arbitration disputes between the parties along the lines contemplated in the Convention where there is a valid written arbitration agreement. For instance, way before 2018, our Courts opined in ***CEE DEE INVESTMENT LIMITED V. SIERRA RUTILE LIMITED***[13] that in so far as a party is estopped from retracting from their submission clause, it does not automatically mean a stay of proceedings is as of right. The *court emphasized that a* stay is only granted where the party applying for it satisfied the court that there is no sufficient reason why the matter should not be referred in accordance with the agreement and that the applicant was ready and willing to do all things necessary to the proper conduct of the arbitration including being ready for arbitration at the time that proceedings were commenced. This has been confirmed in the TIMIS case, post the New York Convention. As per Art II(3) of the New York Convention, the arbitration agreement between the parties must not be invalid, inoperative or incapable of being performed. Justice Charm also stayed court proceedings in **COURTVILLE INVESTMENT V. SIERRA LEONE TRANSPORT AUTHORITY**[14], and referred the dispute to be resolved by arbitration as initially agreed by the parties.

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[9] Volume 6, page 78
[10] Civ. App. 60/2017, para. 37
[11] The American University International Law Review Volume 24/ Issue 3
[12] A member of the UK Chattered Institute of Arbitrators and a lawyer in our jurisdiction. Article titled "The Implications of the Ratification of the New York Convention for Commercial Arbitration in Sierra Leone"
[13] C.C. 10/11 2011 C. No.2
[14] FTCC: 059/13 (2013) SLHC 59

The party seeking a stay must as Justice Edwards clarified in ***LUNAR TRADING V PHILLIP MORRIS SENEGAL*****,** show that they have made efforts to proceed to arbitration. This was inspired by Bankole J's dictum in **KABIA V KAMARA**[15] that: '*a mere agreement between the two parties to arbitration cannot be pleaded in bar of an action brought in respect thereof'*. It may be the ordinary arbitration clause but it is certainly not a submission for the arbitrator is neither chosen nor appointed. *This position was established in the case of* **SCOTt vs AVERY (1856)**[16]. Justice Sengu Koroma in the TIMIS case launched at attack on the principle in **KABIA V KAMARA**, opining that though the case has controlled the question of effect of an arbitration clause in Sierra Leone for about 50 years, it is often wrongly interpreted on the basis that it was decided on its own peculiar facts and not intended to lay down a general rule that our courts are not bound to give effect to an arbitration clause. **SCOTT V AVERY (1856)** inspired the KABIA ruling, but the factual basis for the decision in KABIA was that the party relying on the arbitration clause was at the same time denouncing the existence of a contract between the parties and the arbitration clause in the case had been framed in terms limited only to "disputes which will disrupt the progress of the work." The power to stay though discretionary will be used unless fraud is alleged or where the judicial proceedings are in respect of interim or conservatory issues.

Imran Khan[17] seems to support Justice Sengu Koroma's observation but in the context that the discretion to grant an application for stay of proceedings has been disproportionately limited by the Courts when judges often wrongly rely on *forum non conveniens* standards as expounded in **SPILIADA MARITIME CORP. V. CONSULEX LTD. (1986)**[18] and as adopted in by our courts in **A.P. MOLLER V HADSON TAYLOR & CO. (C.A. 6TH MARCH 1990).** Later cases [19]demonstrate the sluggish reluctance of the courts to grant a stay and give effect to arbitration to resolve commercial disputes. Although Justice Charm must be credited for changing the narrative in the **COURTVILLE** case, Justice Sengu Koroma's stubbornness to address this area of the law started in **MADAM ABI HARUNA V DALIAN SHENGAI OCEAN FISHERY CO. LTD**[20] where he contradicted[21] **KABIA V KAMARA** to at least creep towards honouring the agreement of parties to arbitrate their disputes. It thus explains why the learned judge seem to enjoy debunking **KABIA V KAMARA** in both **VITAFOAM AND LEONE CONSTRUCTION & GENERAL ENGINEERING SERVICES, 2020**[22]; and the **TIMIS** case, just last month.

It must be noted that as stated by Moulton LJ stated in **DOLEMAN & SONS V OSSET CORPORATION (1912)**[23] the consequence of refusing a stay effectively nullifies any simultaneous arbitration, and in these situations, "*the private tribunal if it has ever come into existence is functus officio."*

b. **Establishing the arbitral tribunal** - Pursuant to Section 6 of Cap 25, the arbitrator(s)in some cases may be appointed by the Court or an appointing body but only where the parties cannot agree

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[15] (1976-68) ALR S.L. CA, 455
[16] 10 ER1121
[17] supra
[18] **3 ALL ER 843**
[19] **ATTORNEY GENERAL & MINISTER OF JUSTICE V CAPE MANAGEMENT AND ENTERTAINMENT (CC 352/07 (2007) SLHC 31 and RIGA SHIPYARDS V. OWNERS and/or PERSON INTERESTED IN THE VESSEL M/V REDCAT (CC 105/2012)**
[20] FTCC 122/15 (2015) SLHC 122
[21] per incuriam - sitting in the High Court he ought to have been bound by **KABIA**, a Court of Appeal decision
[22] CIV. APP 61/2017) [2020] SLCA 9 (30 June 2020)
[23] 3 K.B. 257, 269

on the choice of their sole arbitrator, third arbitrator or an umpire; and where the parties fail to appoint a substitute sole arbitrator, third arbitrator or umpire in place of one who dies, refuses to act or is incapable of acting. If there are no applicable institutional or other rules (such as the UNCITRAL Rules), the intervention of a national court may be required to appoint the chairperson or the respondent's arbitrator as envisaged in Art II of the Model Law. In the absence of any such rules, the national court must also intervene to decide any challenge to the independence or impartiality of an arbitrator. In **MONTPELIER REINSURANCE LTD V MANUFACTURERS PROPERTY & CASUALTY LTD (2008)**[24], it was examined that Article 11(4) at the Model Law requires the court to help constitute an arbitration panel wherever it is clear that the agreed appointment procedures have broken down. Regardless, the fact that the Court only intervenes where the parties fail to act or to reach an agreement is indication that primarily, freedom of choice lies with the parties.

c. **Challenges to jurisdiction** - Challenges or objection to the jurisdiction of the arbitral tribunal are generally raised at the beginning of the arbitration and if successful, the arbitral tribunal is terminated thereof. The issue of challenge to jurisdiction is recognized in the Model Law[25] (and in many national systems of law).

Whilst any challenge to the jurisdiction of an arbitral tribunal may be dealt with initially by the tribunal itself, the final decision on jurisdiction rests with the relevant national court. This is either the court at the seat of the arbitration, or the court of the state(s) in which recognition and enforcement of the arbitral award is sought. If a party to an agreement raises an issue of jurisdiction or competence, Cap 25 requires it to be resolved by the High Court. It has been argued that a domestic arbitral tribunal is not permitted to rule on the question of its own jurisdiction or competence. If an international arbitration stipulates the rules governing disputes and identifies Sierra Leone as the seat of the arbitration, then the Court is likely to have regard to the relevant rules in determining any preliminary challenges by one of the parties. However, and interestingly so, Justice Sengu M. Koroma, presiding over a qorum with Justice Reginald Fynn JAand Justice Eldred Taylor-Camara ruling on the 30th July, 2021 in the Court of Appeal[26] opined that "*it is the practice in arbitration that the arbitration panel has the power to rule on its own competence to hear the matter*." About four months earlier to Justice Koroma's ruling, the English Commercial Court sought to distinguish issues of admissibility from issues of jurisdiction in **REPUBLIC OF SIERRA LEONE V SIERRA LEONE MINING LTD [2021]**[27] ruled that non-compliance with a multi-tier dispute resolution provision is an issue of admissibility (i.e. whether the claim is ripe to be heard) rather than jurisdiction (i.e. whether the tribunal is competent to hear the claim at all); a parties compliance with a multi-tier dispute resolution provision is a procedural matter which falls within the competence of the tribunal rather than the English Court to determine; and non-compliance with a multi-tier dispute resolution provision does not give rise to a basis to challenge the jurisdiction of the tribunal before the English Court under section 67 of the Arbitration Act 1996. The decision cited with approval **Gary Born's International Commercial Arbitration (3rd**

[24] SC (Bda) 27 Com (24 April 2008) at 7

[25] **PT TUGU PRATAMA INDONESIA V MAGMA NUSANTARA LTD [2003] SGHC 204,** at [12]: when it comes to questions relating to the jurisdiction of the arbitral tribunal, Article 16(3) gives a party the opportunity to apply to the competent court to review the decision of the arbitral tribunal on jurisdiction-in which case, it is the decision of that court (and not the decision of the arbitral tribunal) that is final and binding.

[26] TIMIS MINING CORPORATION (SL) LIMITED V CAPE LAMBERT RESOURCES LIMITED & ORS, at paragraph 28

[27] EWHC 286 (Comm)

Edition, 2021) and is in harmony with the position in both the United States of America[28] and Singapore[29].

It may seem that the challenge to jurisdiction for the purpose of the current discuss might even extend to the very national courts. In **LUNAR TRADING LIMITED V PHILLIP MORRIS MANUFACTURING (SENEGAL***)* the Defendant sought a stay of the proceedings instituted by Plaintiff in the High Court of Sierra Leone in respect of a dispute arising out of a distributorship agreement between the parties. The Plaintiff argued against the applicability of Cap 25 to the arbitration clause submitting that the court will have no jurisdiction over the appointment, setting up and proceedings of the arbitration tribunal referred to in in the agreement. He argued further that Cap 25 deals with arbitration matters in Sierra Leone and those conducted within Sierra Leone. The Judge upholding such arguments ruled that the Seat of the arbitration is neither Sierra Leone or a Sierra Leonean court. Consequently, Sierra Leone High Court has no control over any arbitration that will take place in Switzerland where the Swiss PIL of 1990 is the governing law for the arbitration and the Swiss Courts are the courts that will apply the law to supervise and support the proceedings and consequently be in a position to grant stay of proceedings or otherwise. The court ruled that it lacked jurisdiction and thus refused the application for stay.

In extension, pursuant to Article13 of UNICITRAL as opined in **PROGRESSIVE CAREER ACADEMYPVTLTD V FIIT JEE LTD (2011)[30],** the competent court may have to decide upon a challenge to an arbitrator if there are justifiable doubts as to that arbitrator's impartiality or independence.

II. DURING THE ARBITRAL PROCEEDINGS

The 'relay race' is at the most important lap. The arbitrators have the baton. Must the court after handing over the baton still run along the arbitrators? Generally, it is thought that they should not be involved in the arbitral process once the tribunal is constituted. This should be so even if one of the parties fails or refuses to take part in the proceedings. There may be sometimes, however, at which the involvement of a national court is necessary to ensure the proper conduct of the arbitration. Need may arise for the competent court to assist intaking evidence, or to make an order for the preservation of property that is the subject of the dispute, or to take some other interim measure of protection. The question that then arises is whether a national court may (or indeed should) become involved in a dispute that is subject to arbitration, and if so, how far this involvement should extend. The following circumstances are considred:

a. Interim Measures - Powers of the Arbitral Tribunal

Though proceedings in the arbitral tribunal may have commenced, it may be necessary for the arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets,

[28] BG GROUP V ARGENTINA 572 U.S.25(U.S S.Ct. 2014)
[29] BBA V BAZ(2020) 2 SLR 453
[30] 5 RAJ 7 Delhi, at {20},

or in some other way to maintain the status quo pending the outcome of the arbitration. These orders operate as holding orders and apply only pending the issue of a final arbitral award. It is interesting to note that although the tribunal itself can issue interim measures of protection, five situations prove that the tribunal's power will be insufficient thereby necessitating the assistance and intervention of a national court.

1. **No powers -** Traditionally, the power to grant interim measures is considered a prerogative of the national courts for public policy reasons. Article 753 of the **Argentina Code of Civil Procedure** for instance provides that the arbitral tribunal shall make a request to the judge who shall give the aid of his jurisdiction for the faster and more effective operation of the arbitral process. Such limitations are nevertheless very rare in practice.
2. **Inability to act prior to the formation of the tribunal** - Prior and without the constitution of the tribunal, it cannot issue interim measures. Establishing the tribunal takes time, during which, vital evidence or assets may disappear. National courts may be expected to deal with such urgent matters. Unlike the case in Sierra Leone, most international institutional rules have sought to address this lacuna in recent revisions through the appointment of so-called 'emergency arbitrators.' In matters of urgency in other jurisdictions, there would be a prompt appointment of a single arbitrator to resolve interim measure issues prior to the constitution of the formal tribunal (summary arbitral proceedings). The role of such an arbitrator ends after the measures are issued. Following these developments in arbitration rules, legislation has also been implemented in certain jurisdictions to facilitate the enforcement of emergency relief orders. Notably, the **Hong Kong Arbitration Ordinance** of 2013 allows Hong Kong courts to enforce relief granted by emergency arbitrators whether the order is issued in Hong Kong or abroad. However, because there is no specific provision for the enforcement of the orders of an emergency arbitrator in Sierra Leone, a party may prefer to rely on the competent national court to ensure state-backed enforcement of an interim order.
3. **An order can affect only the parties to the arbitration** - Considering that third parties must not be affected by an arbitration which is a contract of the parties[31], the assistance of a national court becomes necessary. An arbitral tribunal cannot garnishee[32] accounts in a bank holding deposits of a party as that order would not be enforceable against the bank. Multiparty or multi-contract disputes may also pose similar problems, requiring national court assistance.
4. **Enforcement difficulties** – The New York convention requires finality to an order or award of measures for it to be enforceable internationally. In principle, interim measures ordered by an arbitral tribunal does not meet this threshold unless perhaps an application for such measures is made before the courts of the place of execution. In **SOCIETE SARDISUD V SOCIETE TECHNIP[33]**, the Supreme Court of Queensland refused to enforce an interlocutory injunction issued by an Indiana state court on the basis that it was not an 'arbitral award' within the meaning of the New York Convention.

   A compromise has been struck by some states in that they have sought to label certain interim measures ordered by tribunals as 'awards', at least as far as their own legislation is

[31] The Model Law makes it plain that an arbitral tribunal may order interim measures only against 'a party.'
[32] Such powers are pursuant to Order 50 of the High Court Rules reserves for national courts
[33] Paris Cour d''Appel, lere Ch. Civ., 25 March 1994, [1994] RevArb391

concerned[34]. Arbitral practice varies on this question, although the recent tendency appears to be in favor of tribunals making orders, rather than awards. In the context of an ICC arbitration, that may add considerably to speed of the process, because an order, unlike an award, will not need to be scrutinized by the ICC Court before issue.

5. **No ex parte application** – Should there arise a risk of dissipation of assets or of important evidence being destroyed, a party may desire an ex parte relief. This is less likely to be made to the arbitral which by our arbitration laws in Sierra Leone lacks power to grant such relief. Although the revised UNCITRAL Model Law offers the possibility of limited ex parte applications to the arbitral tribunal, most popular arbitration seats have not incorporated those provisions in their actual arbitration laws, and the rules of the leading institutions do not currently expressly consider such a power for arbitrators. The reasonable and practical approach therefore is to resort to the national courts[35].

b. **Interim Measures - Powers of the Competent Court**

In matters of urgency, there is a need to seek the assistance and intervention of the state court to involve third parties who are not part of the arbitration agreement or to execute the tribunal's order against a party who is refusing to be bound. The measures requested may include the granting of injunctions to preserve the status quo or to prevent the disappearance of assets, the taking of evidence from witnesses, or the preservation of property or evidence. This came up in the recent Court of Appeal decision in **TIMIS MINING CORPORATION (SL) LIMITED V CAPE LAMBERT RESOURCES LIMITED, GRAIG DEEN, GERALD METALS LIMITED AND FRANK TIMIS**[36]. Justice Sengu Koroma presiding made it crystal clear that in Sierra Leone, 'the jurisdiction of the courts cannot be wholly ousted by agreement of parties.'[37] He was intrigued by the case of **CHANNEL TUNNEL GROUP LIMITED V BALFOUR BEATY CONSTRUCTION LTD (1992)** 2 WLR 741[38]. In the CHANNEL case, the English Court of Appeal in construing section 12(6) of their Arbitration Act, 1950 seem to have confirmed the view in **RUSSEL ON ARBITRATION (21st Ed.) at page 386** that this power of the court can be exercised before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant intends to take he dispute to arbitration in due course. This power is for the purpose and in relation to a reference. The applicant must unequivocally state that he relies on the arbitration agreement and aver that he would invoke the arbitration clause.

Such an application raises two concerns. The first is whether applying to a state court than the arbitral tribunal is not a breach of the arbitration clause. Secondly, if the choice between seeking interim measures from the courts or from the arbitral tribunal is truly an open choice, should the application be made to the courts or to the arbitral tribunal? The position of the law on this area in our jurisdiction is presented below seriatim.

Incompatibility with the arbitration agreement? - Though generally correct, it would be naïve to suggest that resort to interim measures before a court might operate as a waiver of the

[34] This is the case in Israel, New Zealand and Malaysia.
[35] To the High Court for an injunctive relief under Order 35 of the High Court Rules, 2007
[36] supra
[37] This view must be cautiously construed as the position in KILL V HOLLISTER (1746) 1 Wils 129 is an old common law rules that doesn't quite favour parties agreeing to arbitrate.
[38] The CHANNEL case was considered in SUNDARAM FINANCE LIMITED V NEPC INDIA LTD (Supreme Court of India – 13 January, 1999)

arbitration agreement[39], or that any order so obtained might be dissolved in the face of a valid arbitration clause. Most arbitration rules[40] are explicit in confirming that an application for interim relief from a court is not incompatible with an arbitration agreement or s a waiver of the agreement.

The judges of national courts are however cautious in granting such interim reliefs so they don't risk prejudicing the outcome of the arbitration. In **CHANNEL TUNNEL GROUP LTD V BALFOUR BEATTY CONSTRCUTION LTD [1993][41]**, the fear of the Court was that it was better to respect the choice of the tribunal which both parties have made, and not take out of the hands of the arbitrators a power of decision which the parties have entrusted to them alone. The court granting an interlocutory mandatory injunction thought a tentative assessment of the merits might well decide the substantive action and leave little for the arbitrators to decide[42].

Should application be made to a national court or to the arbitrators? - Much depends on the relevant law and the nature of the relief sought. The relevant law may make it clear, for instance, that any application should be made first to the arbitral tribunal, and only then to the court of the seat of arbitration. This is the position taken by both English and Swiss law. Whereas Swiss Law empowers the arbitral tribunal to take 'provisional', or conservatory, measures (unless the parties otherwise agree), then states that if the party against whom the order is made fails to comply, the arbitral tribunal may request assistance from the competent court, English law is careful to spell out the position. It does so in three provisos to the court's 'powers exercisable in support of arbitral proceedings', including the preservation of evidence, the inspection of property, the granting of an interim injunction, and the appointment of a receiver. See section 44 (3) - (5) of the Arbitration Act 1996.

In Sierra Leone, Cap 25 is silent on this, and so it is likely to depend upon the particular circumstances of each case. So, if for instance in a matter of urgency, a party applies to the relevant national court for interim measures, he should also take steps to advance the arbitration, so as to show that there is every intention of respecting the agreement to arbitrate. Where the arbitral tribunal is in existence, it is appropriate to apply first to that tribunal for interim measures, unless international enforcement be may required. Parties must understand that any order is binding as between them and it would be foolish of a party to ignore interim measures ordered by the tribunal charged with deciding the merits of its dispute. As SCHWART puts it in 'The practices and experience of the ICC Court', in ICC (ed) Conservatory and Provisional Measures in International Arbitration[43]:
"…the arbitrators' greatest source of coercive power lies in their position as arbiters of the merits of the dispute between the parties. Parties… would generally not wish to defy instructions given to them by those whom they wished to convince of the justice of their claims."

[39] Even section 5 of Cap 25 allows a stay of proceedings by the Court on the condition that the applicant for a stay must have delivered pleadings or taken any step in the proceedings
[40]For example, Article 26(9) of the UNCITRAL Rules and Article 9 of the Model Law.
[41]AC 334, at 367-368
[42] This view has been confirmed in **PATEL V PATEL [1999] All ER (D) 327 (CA).**
[43] ICC Publication No. 519 (ICC, 1993), p. 59:

Considering that the merits of the dispute will be under a foreign law, which the local court will be ill-prepared to consider at an interim stage; the language of the dispute and the contract may be different, and that the chosen court is likely to be at the place of execution of the order to avoid concerns as to enforceability, problems of bias may arise if the measures sought are against a state entity in favour of a foreign corporation.

The nature of the relief (which differs from state to state) sought is also likely to have an important bearing on the question of whether to go to a national court or to the arbitral tribunal. There could be five categories to guide the choice:

a. *measures relating to the attendance of witnesses;*
b. *measures related to preservation of evidence;*
c. *measures related to documentary disclosure*
d. *measures aimed at preserving the status quo; and*
e. *measures aimed at relief in respect of parallel proceedings.*

Measures relating to the attendance of witnesses – Resort to court may be prompted by the lack of power of the arbitral tribunal to compel attendance of witnesses particularly if the witness whose presence is required is not in any employment or other dependent relationship to the parties to the arbitration and so cannot be persuaded to attend voluntarily. Section 9 of the Arbitration Act Cap 25 provides that any party to a submission may sue out a writ of subpoena ad testificandum or a writ of subpoena duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action. As per Article 27 of the Model Law, the State court, with the approval of the arbitral tribunal and on application by a party or the tribunal itself, may execute the request within its competence and according to its rules on taking evidence.

Practically, a subpoena can be issued by tribunals only in respect of witnesses present in the jurisdiction, and there appear to be few instances of the power having been exercised in the context of international arbitrations. It is arguable that the limit to jurisdiction applies even if the foreign national is present in the geographical jurisdiction of the court if the parties would not have contemplated the exercise of such power when selecting that state as a seat for a dispute that otherwise had no connection with the country.

These sorts of subpoenas can be issued only against entities who are parties to the arbitration agreement as in LIFE RECEIVABLES TRUST V SYNDICATE 102 at LLYOD'S OF LONDON[44] were it was held that arbitrators are not authorized to compel pre-hearing document discovery from entities not party to the arbitration proceedings except there is a special need or unusual circumstance. Once a witness is called to testify before the tribunal, section 9 of Cap 25 allows the tribunal to subpoena documents in the witness' possession.

Measures related to the preservation of evidence – Where the dispute is over a perishable good, it is important that it is preserved or proper record be taken of it before it is destroyed. Given that the preservation of evidence is a matter of particular concern right at the beginning

[44] 549 F. 3d 210, 216-217 (2nd Cir. 2008)

of the case, before the formation of the arbitral tribunal, this is an area in which parties are likely to rely heavily on the emergency arbitrator procedure[45].

Arbitration laws may grant specific powers to national courts to support arbitration by means of the granting of interim injunctions to preserve evidence. In **CETELEM SA V ROUST HOLDINGS LTD [2005][46]**, the Court considered that where the property could include contractual rights, there was no bar to the issuing of a mandatory Injunction. The key question was the need to protect the rights that would be the subject of the arbitration.

Measures related to documentary disclosure – Paragraph f to the Schedule of Cap 25 mandates parties to the reference, and all persons claiming through them respectively to '*submit to be examined by the arbitrators or umpire on oath or affirmation, in relation to the maters in dispute, and shall , subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require*'. Similarly, parties are encouraged by the Commercial and Admiralty Court Rules 2010 to attend pre-trial settlement conference with all relevant documents, in the knowledge that any disclosure made at this stage will be without prejudice. Glenna Thompson J.[47] submits that the parties themselves can by their agreement set the rules of disclosure. On certain occasion the limitation on the power of the tribunal to order disclosure from parties to the litigation and not a third party becomes crucial. Even if the state court of the seat of arbitration intervenes, the relevant third party is unlikely to be within its jurisdiction. The usual result is that third-party documents remain outside the scope of the arbitral process. However, this limitation does not apply in all jurisdictions in the United States, where an application to obtain disclosure of documents in a foreign arbitration is possible under section 1782 of Title 28 of the US Code permitting a district court to order a person who 'resides or is found' in the district to give testimony or produce documents' for use in a foreign or international tribunal…upon the application of any interested person.' The meaning of the word 'tribunal' was in **RE ROZ TRADING LTD[48]**, extended to a private arbitral tribunal.

Measures aimed at preserving the status quo – Damages would be insufficient to compensate for damage to reputation, loss of business opportunities, and similar heads of claim, which are real enough, but difficult to prove and to quantify, even if they are considered to be legally admissible. In such cases, a party may desire that the status quo prior to the intended damage be maintained until the dispute is resolved by arbitration. A party desirous of applying to a national court while waiting for the tribunal to be constituted will have to consider whether the court has the power to act, and if so, whether, in the particular circumstances, it should act. This came up for consideration in the **CHANNEL TUNNEL** case. The House of Lords considered that it did have power to grant an injunction, but thought it inappropriate to do so. Conscious of this, Lord Mustill warned that although a mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed

[45] This is doubtful in Sierra Leone
[46] EWCA Civ 618
[47] Arbitration Procedures and Practice in Sierra Leone: Overview: Law stated as at 01-November, 2015; https://uk.practicallaw.thomsonreuters.com/3-619-8606?transitionType=Default&contextData=(sc.Default)
[48] 469 F. Supp. 2d 1221 (ND Ga. 2006)

in the action; it is possible for the court at the pre-trial stage of the dispute arising under a construction contract to order the defendant to continue with a performance of the works, but the court should '*approach the making of such an order with the utmost caution and should be prepared to act only when the balance of advantage plainly favors the grant of relief*.' Each case has to be assessed individually.

Interim relief in respect of parallel proceedings – Arguably, it is now reasoned in developed arbitral jurisdictions that State Courts cannot interfere with arbitral proceedings[49]. Alas, a *'turf war'* continues in other parts of the world, where there is an uncomfortable trend towards the issue of 'anti-arbitration' injunctions, either by the courts of the seat or by the courts of the place of eventual enforcement. This is common where a dispute arises between a foreign party and a state, or state-owned entity that wishes to sabotage the arbitral proceedings and have the case remitted for judicial determination in its own courts. It therefore seeks an injunction before those courts, seeking to challenge the jurisdiction of the tribunal, and an order requiring the arbitrators and adverse party to suspend or abandon the arbitral proceedings on pain of daily fines (or worse). Tribunals find themselves in the dilemma of obeying such orders (sourced from improper government intervention) and seeking to ensure justice in the individual case, often at risk of monetary penalties (or worse).

Where it is a UNCITRAL case, the tribunal can seek to avoid injunctions of national courts in extreme circumstances considering that such a case can be held 'at any place (the tribunal) deems appropriate', and so the physical transfer of the hearings to another party state is permitted by the Rules. In connection with the injunction itself, Article 28 of the UNCITRAL Rules allows a tribunal to proceed with the arbitration notwithstanding one party's default whenever the defaulting party has failed to show 'sufficient cause' for its default. The very existence of the arbitration agreement, and the involvement of a state party, would entitle the tribunal to apply international law. In **BENTELER V BELGIUM[1985][50]**, an international tribunal had held that 'a state which has signed an arbitration clause or agreement would be acting contrary to international public policy if it subsequently relied on the incompatibility of such an obligation with its internal legal system.'[51]. It would constitute 'a denial of justice for the courts of a State to prevent a foreign party from pursuing its remedies before a forum to the authority of which the State consented. An international arbitral tribunal is not 'unconditionally subject' to the jurisdiction of the courts at the seat of the arbitration. Specifically, the 'adjudicatory authority' of an international tribunal 'does not emanate from a discrete sovereign but rather from an international order'.

In **SALINI CONSTRUTTORI SPA V FEDERAL DEMOCRATIC REPUBLIC OF ETHIPIA, ADDIS ABABA WATER AND SEWERAGE AUTHORITY[52],** the ICC tribunal held that it had the discretion – indeed the duty-not to comply with the a state Supreme Court's "anti-arbitration" injunction. An agreement to submit disputes to international

[49] See SA Elf Aquitaine and Total v Mattei, Lai, Kamara and Reiner, Paris Court of First Instance, 6 January 2010; Reisman and Iravani. 'The changing relation of national courts and international arbitration' (2010) 21 Am Rev Intl Arb 33

[50] 8 European Commercial Cases 101

[51] See HIMPURNA CALIFORNIA ENERGY LTD (BERMUDA) V REPUBLIC OF INDONESIA (200) XXV YBCA 11, (169). This is supported by Article 31 and 32 of the Vienna Convention on the Law of Treaties

[52] ICC Case No. 10623, 7 December 2001, available online at http://italaw.com/documents/Salini_v._Ethiopia_Award.pdf, at [128],

arbitration 'is not anchored exclusively in the legal order of the seat ... [but is] validated by a range of international sources and norms extending beyond the domestic seat, particularly the New York Convention, which embodies 'principles of general [recognition]. In the same way as a state cannot rely on In its own laws to justify breach of contract, so a state entity cannot resort to the state's courts to frustrate an arbitration agreement.

These instances should not mislead us to think that most arbitrations are pursued with interference from domestic courts. Nevertheless, the evolution of an international law to which tribunals must respond, even if in conflict with the dictates of the courts of the seat, may cause such courts to curtail their partisan zeal and conform to accepted international norms. Mr. Osman Jalloh at page 8 of his article[53] observes that "the public policy considerations and the provisions of Sierra Leone's States Proceedings Act No.14 of 2000 which does not provide for direct enforcement of awards against the Government of Sierra Leone would mean our Enforcement Courts would not permit executions against the Government as they would do in regard private individuals and entities". He however commends Sierra Leone's ratification of the New York Convention as a progressive thinking approach that could lead to execution being levied against the Government in the same manner as is the case for private individuals and entities.

III AT THE END OF THE ARBITRATION

Judicial control of the proceedings and the award.

It is time to hand over the baton to the national court. At this point of the race, only it can run the last lap. Lord Saville recognised this in 'The Denning Lecture 1995: Arbitration and the courts' (1995) 61 Arbitration 157, at 157, pointing out that primarily, if parties agree to resolve their disputes through the use of a private rather than a public tribunal, then the court system should play no part at all, save perhaps to enforce awards in the same way as they enforce any other rights and obligations to which the parties have agreed. To do otherwise is 'unwarrantably to interfere with the parties' rights to conduct their affairs as they choose. Since the state is in overall charge of justice, and since justice is an integral part of any civilized democratic society, the courts should not hesitate to intervene as and when necessary, so as to ensure that justice is done in private as well as public tribunals.

Recognition and Enforcement of Awards

Section 13 of Cap 25 prescribes that an award on a submission may by leave of the Court be enforced in the same manner as a judgment or order to the same effect. Mr. Osman Jalloh has observed[54] that the New York Convention has as its advantage to Sierra Leone the fact that it ensures the recognition and enforcement of arbitral awards made in the territory of a state (lex fori) other than the state where recognition and enforcement of such awards are being sought. Contracting/Member States are to recognise arbitral awards as binding and enforce them[55] in their territory as if it were ordinary domestic arbitral awards of that same territory, conferring the equal treatment to the foreign arbitral awards as is done for ordinary arbitral awards. However, where the convention is not incorporated in our laws by our Parliament, it would prove difficult for the Courts in Sierra Leone to directly do so. The Convention applies to both monetary and non-

[53] supra
[54] supra
[55] In accordance with the rules of procedure of the Contracting State, subject to the Convention's terms

monetary foreign arbitral awards arising from contractual and non-contractual disputes that are delivered by either ad hoc or permanent arbitral bodies[56]. However, only when a foreign arbitral award is delivered by a duly constituted arbitral tribunal can it be recognized and enforced. Further, in order to enforce an international award, it must first be registered under the Foreign Judgments (Reciprocal Enforcement) Act which apples to arbitration awards in the same way that it does to judgements.

A party who wishes to secure the recognition or enforcement of an arbitral award has to satisfy three requirements under Article 4 of the New York Convention[57]:

i. That the award has been granted in a Contracting State separate from the Contracting State in which the recognition and enforcement is sought. An arbitral award may be given in a Contracting State however and be enforceable in such a state where the award granted is considered to be nondomestic. An award may have been given in Sierra Leone by if English law and procedure were applied, notwithstanding the award being made in Sierra Leone, it would be deemed to be not a domestic Sierra Leone. For this, the learned arbitrator refers to the judgment of the United States Court of Appeal Second Circuit in the case of **BERGESEN V. JOSEPH MULLER CORP**.[58]

ii. Submit to the Court in the Contracting State where enforcement is sought (referred to in this article as "Enforcement Court") a certified true copy of the arbitral award sought to be recognised and enforced and the original or a copy of the arbitration agreement. Mr. Jalloh argues that under the provisions of section 13 of Cap 25 of the Laws of Sierra Leone 1960, this could be done by way of an Originating Notice of Motion supported by affidavit and exhibited to the affidavit should be the arbitration agreement and the award itself. If leave is granted, the party may employ any of the enforcement mechanisms available in the jurisdiction such as garnishee proceedings, order of fife and examination of judgment debtor amongst others. By paragraph h to the Schedule of Cap 25, the award of the arbitrators or umpire is final and binding on the parties and the persons claiming under them respectively. On the contrary, Glenna Thompson[59] [answering questions 32 and 33 in her article] seem to suggest that section 13 is for arbitration awards made in Sierra Leone. However, her opinion was given prior to ratification of the New York Convention, during which time enforcement proceedings of a foreign arbitration award were subject to the High Court Rules 2007 and had to be made by way of a writ of execution, no later than six years from the date that the award is registered as a foreign judgment. According to Mr. Jalloh whose opinion post-dates the New York Convention, if for instance, an award is made in the United Kingdom of England and Wales (the UK), and a Contracting State to the New York Convention is sought to be enforced in Sierra Leone[60], the courts of Sierra Leone would be, in this context the Enforcement Court.

Challenging the RECOGNITION AND ENFORCEMENT of the Award.

[56] (Article 2 (2) to the Convention)
[57] As appreciated by Osman Jalloh Esq., supra, page 4 of his article
[58] 710 F.2d 928 (2d Cir. 1983)].
[59] supra
[60] assuming all the process towards fully becoming a Contracting State have been complied with and there are no reservations on its part

Section 12 of Cap 25 empowers the national courts to set aside arbitral awards in certain cases. The New York Convention also defines the paramaters by virtue of which the courts in Contracting States may refuse recognition and enforcement of foreign arbitral awards. The question as to the power of the Court to set aside arbitration awards came up in the Sierra Leone Court of Appeal in **VITAFOAM AND LEONE CONSTRUCTION & GENERAL ENGINEERING SERVICES**[61]**,** the lower court having refused to set aside the award. This jurisdiction of the Court is sourced from section 12(2) of Cap 25 such as where an arbitrator or umpire has misconducted himself, or an arbitration award has been improperly procured. However, awards of the arbitration tribunal should generally be considered final[62], and should not be challenged by a party who was heard or had an opportunity to be heard but deliberately forfeited it[63]. In such a case, it is argued in **Russell on Arbitration 23'd Edition**[64] that it is right to proceed in the absence of that party and this would not hurt the audi alterem partem rule[65]. This position would be fortified if as opined in **SIERRA FISHING COMPANY & OTHERS -V FARRAN & OTHERS (2015)**[66]**.,** the complaining party decides to appear in subsequent proceedings thereby waiving the purported irregularity of not being heard. However, in the **VITAFOAM** case, Justice S. Koroma relying on **RUSSELL ON ARBITRATION**, **16th Edition at page 302** examined that an arbitral award would be set aside where the arbitrator through his own actions conducts an arbitration ex-parte without substantial reason, or where the parties who are entitled to be present are excluded, or the rejection or acceptance of a testimony and the improper passing of duties. **HALSBURY LAWS OF ENGLAND (4 t h Edition) Vol.2 paragraph 622** also seems to clarify section 12(2) of Cap 25 in that inadequately justified arbitral award amounts to arbitration misconduct. The learned Justice Koroma was further persuaded by the Indian Supreme Court decision in **COCHIN SHIPYARD V APPLEJAY**, where it was held that as far as this is concerned, there must be manifest or palpable misconduct from the proceedings before the arbitrator.

As Glena Thompson puts it, the arbitral award can be challenged by a party to the award, within the time limit provided in the order giving leave to register the award, after service of the notice of registration on that party. She goes further to state that the judge can order that the registration be set aside or execution on the judgement suspended either unconditionally or on such terms as he thinks fit. Conditions may range from the award been satisfied, that the award could not be enforced by execution in the country of origin, that it is not just or convenient that the award is enforced in Sierra Leone or for any other sufficient reason. Relying on Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts, Joseph T. McLaughlin and Laurie Genevro, 3 Int'l Tax & Bus. Law. 249 (1986), Mr. Osman Jalloh has identified nine instances Under Article V to the New York Convention, where the Enforcement Court can refuse to recognise and enforce an award ranging from capacity of the parties or validity of the arbitration under the applicable law, where no notice of the arbitration proceedings or the appointment of the arbitrator was given to the party against whom the award is sought to be enforced; audi alterem partem; the award is ultra vires the arbitration agreement; the arbitral proceedings were not conducted in accordance with the agreement of the parties, or, where there is no such agreement, in conformity with the law of the country where the proceedings were conducted (the "*lex loci*

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[61] supra
[62] AYE-FENUS ENTERPRISE LTD V. SAIPEN NIGERIA LTD (2009) 2 NWLR 483 AT 513
[63] ORPORACION TRANSNACIONAL DE INVERSIONS S.A.C. -V STET INTERNATINAL SPA 1991 Canlii (1489) ON SC at paragraphs 65 and 73
[64] at page 260, chapter 5 at paragraph 5 - 192
[65] **CONTINENTAL SALES LTD V R. SHIPPING INC (2012) LPELR** – 7905 **C.A** per Ogunwumiji JSC
[66] EWHC 140

arbitri"); the the award is to yet become binding on the parties or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to the law of the arbitration agreement.; the res of the award is not arbitrable under the law of the enforcing country; or

public policy considerations. These factors give enforcement court a wide latitude in considering the enforceability of the arbitral award. Enforcement Courts in Sierra Leone as earlier mentioned can also find these grounds of refusal in UNCITRAL (as amended in 2006).

Conservative Judicial Approach to matters related to Arbitration

The courts have always recognized that arbitration is a good alternative to litigation as long as the arbitration does not attempt in any way to oust the jurisdiction of the courts. However, there have been a slew of court decisions which shows conservative approach towards the interpretation and application of the law on arbitration in Sierra Leone. For example, the Court in the case of **KABIA V KAMARA (1967-1968)** ALR Sierra Leone series 455 at 459 decided that an arbitration clause is terminated alongside its parent contract in the event of termination of the contract as a whole. Such a decision was made irrespective of the existing fact at the time that the UK court had decided more than a decade earlier in the case of **HEYMAN V DARWIN** that an arbitration clause existed independent of the parent contract. This has however being modified by our Court of Appeal in the VITAFOAM case. Such conservative approach also extends to the procedure of arbitration tribunal. As stated earlier in the introduction, arbitration is flexible. Such flexibility extends to arbitral procedure with the parties at liberty to define the procedural scope of the arbitral proceeding if they are in agreement. Also, the arbitrator is given wider room to operate as long as he doesn't misconduct himself during the proceedings. However, the courts in exercising its supervisory jurisdiction have made decisions in which it tends to obstruct the flexibility of arbitration procedure. An example if found in the case of **VITAFOAM (SL) LTD V LEONE CONSTRUCTION AND GENERAL ENGINEERING SERVICES CIV.APP.61/201**7 which dealt with an arbitration relating to a construction contract. It was held by the court that the arbitral tribunal is required to physically inspect the site rather than the tribunal visiting the site when necessary.[67] Such rigidity goes further to eclipse the role of an expert appointed by the tribunal to go to the root of the matter.

Conclusion

As Reymond observed[68], the development of law and international arbitration has been marked by an obvious tendency to limit the possibilities of court intervention in the course of an arbitration. It may be that the tide is now turning: it is increasingly realized in international arbitration circles that the intervention of the courts is not necessarily disruptive of the arbitration. It may equally be definitively supportive. As in all relationships, the appropriate balance must be found between the rights of the courts to supervise arbitrations and the rights of parties to solicit the courts' assistance in times of need.

[67] see paras 73 and 74 of the judgment

[68] 'The Channel Tunnel case and the law of international arbtrations' (1993)109 LQR 337, at 341