

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1041 of 2023

(Arising from Miscellaneous Cause No. 0017 of 2021)

GREAT LAKES ENERGY COMPANY NV APPLICANT

VERSUS

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| 1. MSS XSABO POWER LIMITED | } | |
| 2. BRYAN XSABO STRATEGY CONSULTANTS (U) LTD | } | |
| 3. MOIA SOLAR SYSTEMS (UGANDA) LIMITED | } | |
| RESPONDENTS | | |
| 4. CONSICARA GLOBAL INVESTORS LIMITED | } | |
| 5. DR. DAVID ALOBO | } | |

Before: Hon Justice Stephen Mubiru.

RULING

a) Background:

The applicant is an international energy company incorporated and registered in the Netherlands with interests in various countries in Africa, while the 1st respondent is a company incorporated in Uganda for the purpose of managing and operating solar and wind power plants in Uganda. The applicant is part of a multinational conglomerate generically referred to as the Janus Continental Group (“the JCG Group”) and a subsidiary of GL Africa Energy Limited. The beneficial owner of the JCG Group is and was at all material times Humphrey Kariuki Ndegwa, a Kenyan businessman. The 2nd to 4th respondents are all companies incorporated in Uganda, the 2nd applicant held 80 ordinary shares while the 3rd applicant held 20 ordinary shares in the 1st respondent. The rest of the respondents are both direct and indirect shareholders of the 1st respondent. The 2nd to 4th respondents are all owned and/or controlled by the 5th respondent, Dr David Alobo, a private individual who resides in Germany.

The applicant and the respondents entered into an investment and ancillary agreements for building, developing and maintaining a 20MW capacity solar photovoltaic generator facility at Kabulasoke, Gomba District. At the material time, the 2nd and 5th respondents owned and

controlled the 1st respondent, which is the project company which holds the licence to build, own and operate the Project. By those agreements, the 2nd and 3rd respondents as the original shareholders of the 1st respondent, entered into a shareholders' agreement, a memorandum of understanding and an investment agreement in which the applicant as a lender, would become a shareholder in the project company upon paying for the shares so allotted to it. The parties executed multiple other transactional documents including; a Call Option Agreement giving the applicant a call option right over shares in the 1st respondent, a Shareholders Agreement in respect of the 1st respondent, Loan Agreements, a series of Share Charges which secured the applicant's rights in respect of its investment in the 1st respondent and a personal guarantee issued by 5th respondent in respect of his and the 1st respondent's obligations to the applicant.

Among the multiple other transactional documents executed, were two loan agreements not contemplated by the Investment Agreement, to wit; a US \$150,000 loan agreement dated 24th July 2017 which was expressly to finance the 1st respondent's costs on the Project pending completion of the Investment Agreement. Consequently the applicant paid to the 1st respondent US \$ 150,000 in five tranches between July, 2017 and February, 2018 and no part of the loan has been repaid. An additional loan agreement was on 28th February, 2018 executed in the sum of US \$ 5,000,000 which was also stated to be for the purpose of financing the 1st respondent's running costs on the Project pending completion of the Investment Agreement. Consequently the applicant paid to the 1st respondent US \$ 5,000,000 in five tranches between February, 2018 and July, 2018 and no part of that loan too has been repaid. During the month of July, 2018, the applicant entered into a US \$ 10,000,000 facility agreement with 1st respondent, making that sum available to the 1st respondent (including US \$ 1m already advanced on 15th June, 2018) to fund the 1st respondent's operating expenses. All sums drawn under that facility were repayable with interest on its Termination Date which, unless otherwise extended was 31st December 2020. Between June, 2018 and January, 2019 the 1st respondent drew down a total of US \$ 9,420,000 in four tranches. No part of the facility has been repaid by the 1st respondent.

The applicant having expended monies into the project, and become a shareholder in the project company, it was tasked to look for engineers to construct the solar power station at Kabulasoke, Gomba District, during which process a dispute arose sometime during the year 2019 when the

2nd and 3rd respondents accused the applicant of having inflated the cost of the engineering and construction component, to a tune of around US \$ 6,000,000 without the knowledge of the project company, fellow shareholders and promoters of the project company. The 5th respondent claimed to have discovered that the applicant's beneficial owner had instructed the EPC Contractor, M/s ImMODO Power Africa, a company which the 1st applicant contracted to do the engineering, procurement and construction of the power plant, to inflate the project cost by adding US \$ 6,450,000 as purported consultancy fees yet no such services were to be rendered. It was claimed that the applicant in conjunction with its ultimate beneficial owner, Mr Kariuki, and others, had conspired to defraud the respondents by dishonestly inflating the true cost of the Project and secretly siphoned US \$ 6,125,000 back to themselves or received US \$ 3,089,235 as secret commission under the guise of this consultancy. The respondents then rescinded the investment agreement on basis of which the applicant had become a shareholder in the project company and also revoked the allotment of shares to the applicant. As a consequence of this decision, the respondents considered themselves to be released from all obligations under the Investment Agreement and the Ancillary Agreements.

The applicant denied any such conspiracy and maintained that the Agreements remained in full force and effect. The applicant counterclaimed that the respondents had failed to comply with their various obligations to the applicant under the Agreements as a result of which the applicant had not received the equity investment in the 1st respondent to which it would have been entitled, and has not been repaid under the various loans in accordance with their terms. Notwithstanding the dispute, the Project was successful in the sense that construction of the solar power plant at Kabulasoke was completed and the Commercial Operations Date was achieved on 9th January 2019 when the power plant was officially commissioned. The plant is generating and supplying power to the Uganda Electricity Transmission Company Limited (UETCL) under a 20-year power purchase agreement entered into with 1st respondent executed on 21st December 2016.

Pursuant to the arbitration clause in the investment agreement, the applicant commenced arbitral proceedings at the London Chamber of International Arbitration, seeking specific performance of the investment agreement. Each of the applicant's claims arose out of distinct agreements, therefore eight requests for arbitration were filed but consolidated into one.

The first phase of the consolidated arbitration focused on the respondents' allegations of fraudulent conspiracy in the procurement of the EPC Contractor for the project which formed the respondents' cross claim. This phase resulted in a partial award rendered on 11th March, 2022 where the Tribunal made several declaratory orders in the operative part of its award. It found
5 that all agreements were valid and of full effect. The Tribunal found for the respondents in respect of their claim for breach of fiduciary duty but determined that none of their other claims, particularly their claims for fraudulent conspiracy, were made out.

The second phase of the arbitration primarily dealt with and decided all outstanding claims and
10 crossclaims in the arbitration save for those that were reserved for a further phase. This time, the focus was on the applicant's claims for relief arising out of the respondents' breach of contractual obligations under the Investment Agreement and the ancillary agreements. This phase resulted in the second partial award rendered on 10th January, 2023. The Tribunal made several orders in the operative part of its award. It found for the applicant on a majority of the reliefs
15 sought in the arbitration. The parties are now awaiting an award regarding the third and final phase of those proceedings.

During the course of those proceedings, the applicant sought and obtained from this Court, a preservation order against the respondents. The court on 16th August, 2021 issued an interim
20 measure of protection order, restraining the respondents from withdrawing from the 1st applicant's bank accounts held at DFCU Bank, any amount of money exceeding US \$ 60,000 per month in order to meet its operational expenses, until the final conclusion of the arbitral proceedings. In its ruling, the court stated that "it should be emphasised that the fixed fee is not cast in stone, for the respondents are still at liberty to put up a case for the adjustment of the fee
25 in case there is good cause..." The respondents have since then once sought, unsuccessfully, to have the order varied to enable them to exceed that limit, by withdrawing a sum of £ 59,649 to meet venue hire and mediation fees at the London Chamber of International Arbitration.

However the applicant has previously on 14th October, 2022 succeeded in causing a variation of
30 that order, by which variation the respondents, their servants, agents and persons claiming under them or from them as successors in title or creditors, were further restrained from transferring,

assigning, committing, or pledging or causing to be transferred, assigned, committed, or pledged any of the protected funds on the 1st respondent's specified bank accounts, except in accordance with paragraph (b) of the interim measure of protection order as issued by this Court on 16th August, 2021. By that variation, the funds on the 1st respondent's bank accounts were protected
5 from attachment in execution of any decree, of amounts exceeding US \$ 60,000 per month until full recovery, until the final disposal of the ongoing arbitration by the London Chamber of International Arbitration in Consolidated Arbitration No.204602, or unless the court orders otherwise upon application of the parties.

10 b) The application;

This application by Chamber summons is made under the provisions of section 6 (1) and (2) of *The Arbitration and Conciliation Act*, section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act* and Rule 13 of *The Arbitration Rules*. The applicant seeks further variation of the
15 order of interim measure of protection, to include orders that;

(i) any and all persons or parties are restrained from accessing funds remitted by the UETCL into any bank account of the 1st respondent including but not limited to the Shillings Account No. 0I063626448460 and US Dollars Account No. 02063616455284 both in the name of the 1st respondent held at
20 DFCU Bank Limited, Acacia Avenue (Mall) Branch, Kololo until final determination of the applicant's appeal in the Court of Appeal arising from Consolidated Arbitration Cause No. 002 and 005 of 2023 (Great Lakes Energy Company NV v. MSS Xsabo Power Limited & others) except by way of application to this Honourable Court.

(ii) the respondents are restrained from assigning, committing or pledging any of the funds remitted by the UETCL into or otherwise held in any bank account of the 1st respondent including but not limited to Shillings Account
25 No. 0I063626448460 and US Dollars Account No. 02063616455284 both in the name of the 1st respondent held at DFCU Bank Limited, Acacia Avenue
30 (Mall) Branch, Kololo until final determination of the applicant's appeal in the Court of Appeal arising from Consolidated Arbitration Cause No. 002

and 005 of 2023 (Great Lakes Energy Company NV v. MSS Xsabo Power Limited & others) except by way of application to this Honourable Court.

5 (iii) The respondents, their servants, agents and persons claiming under them or from them as successors in title or creditors, be restrained from transferring, Assigning, committing, or pledging or causing to be transferred, assigned, committed, or pledged any of the funds remitted by the UETCL into or otherwise held in any bank account of the 1st respondent including but not limited to Shillings Account No. 0I063626448460 and US Dollars Account No. 02063616455284 both in the name of the 1st respondent held at DFCU Bank Limited, Acacia Avenue (Mall) Branch, Kololo until final determination of the applicant's appeal in the Court of Appeal arising from Consolidated Arbitration Cause No. 002 and 005 of 2023 (Great Lakes Energy Company NV v. MSS Xsabo Power Limited & others) except by way of application to this Honourable Court.

10 (iv) DFCU Bank Limited be restrained from transferring, releasing, debiting or otherwise paying out any of the funds remitted by the UETCL into or otherwise held in any bank account of the 1st respondent including but not limited to Shillings Account No. 0I063626448460 and US Dollars Account No. 02063616455284 both in the name of the 1st respondent held at DFCU Bank Limited, Acacia Avenue (Mall) Branch, Kololo until final determination of the applicant's appeal in the Court of Appeal arising from Consolidated Arbitration Cause No. 002 and 005 of 2023 (Great Lakes Energy Company NV v. MSS Xsabo Power Limited & others) except by way of application to this Honourable Court.

20 (v) Any of the parties to the London Court of International Arbitration Consolidated Arbitration No.204602 that commences or becomes aware of legal proceeding reasonably expected to or actually affecting any of the funds remitted by the UETCL into or otherwise held in any bank account of the First Respondent including but not limited to Shillings Account No. 0I063626448460 and US Dollars Account No. 02063616455284 both in the name of the 1st respondent held at DFCU Bank Limited, Acacia Avenue

(Mall) Branch, Kololo until final determination of the applicant's appeal in the Court of Appeal arising from Consolidated Arbitration Cause No. 002 and 005 of 2023 (Great Lakes Energy Company NV v. MSS Xsabo Power Limited & others) except by way of application to this Honourable Court;

5 (vi) The respondents, their servants, agents and persons claiming under them or from them as successors in title or creditors, be restrained from attaching in execution any decree, of amounts exceeding U \$ 60.000 per month until full recovery, from any of the funds remitted by the UETCL into or otherwise held in any bank account of the 1st respondent including but not limited to
10 Shillings Account No. 0I063626448460 and US Dollars Account No. 02063616455284 both in the name of the 1st respondent held at DFCU Bank Limited, Acacia Avenue (Mall) Branch, Kololo until final determination of the applicant's appeal in the Court of Appeal arising from Consolidated Arbitration Cause No. 002 and 005 of 2023 (Great Lakes Energy Company
15 NV v. MSS Xsabo Power Limited & others) except by way of application to this Honourable Court.

It is the applicant's case that the proceedings in LCIA Consolidated Arbitration No. 204602 have been ongoing and the arbitral tribunal has advised that it expects its final award will be rendered
20 any time after 3rd July, 2023. Once LCIA Consolidated Arbitration is finally determined by the arbitral tribunal and the final award rendered, the injunction will lapse and the respondents by themselves or through their agents will proceed to access and utilize the funds remitted by the UETCL into any bank account of the 1st respondent before the final determination of the applicant's appeal in the Court of Appeal, thereby rendering the appeal and the purpose of the
25 freezing order nugatory.

c) The Affidavit in reply:

By the respondents' affidavit in reply it is averred that the alleged appeal by the applicant against
30 the decision of this Court in Arbitration Cause No.002 of 2023 and 005/2023 is incompetent, frivolous, vexatious and a sham since an appeal is a creature of statute. *The Arbitration and*

Conciliation Act does not cater for an appeal in an application rejecting / denying enforcement and recognition and the applicant did not seek any leave from this court or the Court of Appeal to appeal against the decision of this court in Arbitration Cause No. 002 of 2023 and 005 of 2023. Interim measures of protection can only be granted before or during arbitral process and cannot
5 be granted to outlive the arbitral process but rather only applicable during the lifetime of the arbitral process. Any interim measure of protection that outlives the arbitral process would be illegal and contrary to the spirit and letter of *The Arbitration and Conciliation Act*. If the orders sought are granted, the operations of the 1st respondent will be stifled due to lack of access to funds.

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Since the Tribunal is aware of the orders of preservation of this court, it is the right body with the requisite mandate to make final orders regarding the funds which were preserved and not this court. This application is incurably defective since it is a disguised application for a temporary injunction when there is no pending suit before this court. This application has no merit since it
15 is purely speculative without any iota of evidence that the respondents intend to access and utilise the funds in the 1st respondent's bank account. Under the LCIA Rules, once the arbitral tribunal is formed, a party to the arbitration cannot seek interim measures of protection from domestic court without the authorisation of the Tribunal. The applicant has not sought any authorisation from the Tribunal to seek this interim measure of protection and /or variation of the
20 interim measure of protection from this court. To grant the order being sought would be a violation of party autonomy which is the bedrock of arbitration.

d) The submissions of counsel for the applicant:

25 Counsel for the applicant M/s S & L Advocates (formerly Sebalu & Lule Advocates) together with M/s Kashillingi, Rugaba and Associates, Advocates & Tax Consultants, submitted that the applicant seeks an order of variation of the existing order of the court. It was issued on 16th August, 2021 and varied on 18th October, 2022 to cover material changes. The arbitration is in the final phase and a final ward is pending. Two partial awards were rendered and the applicant
30 sought to enforce them. On 24th April, 2023 a decision was rendered by which partial enforcement was allowed. Section 38 does not apply to the present circumstances. The marginal

note is for domestic arbitration. The one before the Court is from international arbitration. The enforcement is governed by The New York Convention. Article 1 of the Convention covers it. Section 43 of *The Arbitration and Conciliation Act* creates a decree out of the award. The general right of appeal under section 66 of *The Civil Procedure Act* is then triggered. Article 3 of
5 the Convention requires recognition in accordance with the rules of procedure of the territory where enforcement is sought. It is limited to procedural matters. The formal requirements are under section 35. Section 9 of the Arbitration and Conciliation Act does not apply to recognition and enforcement. The decisions on the right of appeal in arbitration. They do not apply here; *Babcon v Mbale* is distinguishable because it arose out of a domestic arbitral award. It concerns
10 section 34 of the Act which is about setting aside a domestic arbitral award. Section 38 does not apply. In *Makula International Case*, is that resort can be made to the general right if the statute is silent.

There is an eminent threat that the court order to freeze funds which form the subject matter of
15 the arbitration. Hence to preserve the efficacy of the arbitral process. The applicant has a specific interest to protect the funds which are already partly affected by the enforceable part of the award. The order lasts until the end of the arbitration. The respondents would then have access to the funds. If the order lapses then the sole asset which has been preserved by the court since 2021 will be dissipated. It should be varied to last until the disposal of the appeal or alternatively
20 until the residual proceedings at the end of the arbitration are completed. Even after the arbitral process a variation can be done. The final award is not to do with the right of the parties, having found that the applicant has up to 60% of the company and therefore interested in the business, the applicant would not take any action to cripple it. The respondents were tasked by the tribunal to account for the funds that were received by the company and how they were spent and the cost
25 of the arbitration. The US \$ 60,000 was arrived at after agreeing with the respondents on how much money would be required monthly for the business to run. The Judge gave them more than what they had asked for.

e) The submissions of counsel for the respondents:

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Counsel for the respondents M/s Nambale, Nerima & Co. Advocates & Legal Consultants together with M/s Makada & Partners Advocates and Solicitors, opposed the application. They submitted that under section 6 of *The Arbitration and Conciliation Act* an interim order can only last during the pendency of the arbitral proceedings. Enforcement is not part of the proceedings.

- 5 The Court has no jurisdiction to extend it beyond the pendency of the proceedings in London. There is no right of appeal. None of the laws cited create a right of appeal. Section 9 of the ACA removed any right of appeal or intervention by Courts unless otherwise specified in the ACA. The general provisions of the CPA are inapplicable as per *Babcon v Mbale Resort, CA 87 of 2011* and *S.C. Appeal No. 6 of 2016*. The decision applies to both domestic and foreign awards.
- 10 The Court rejected the *Makula* and *Bireije* decisions regarding the general right of appeal. There was no right of appeal when the ruling for leave was made.

The decision appealed was an order allowing recognition of parts of the award and rejecting others. It is not a decree. The award is enforced as a decree. There is no right of appeal. Residual
15 proceedings extension is not appealable. Court cannot make orders in anticipation but rather measures pending enforcement. There is no appeal yet in the Court of Appeal. There is only a notice of appeal. The prayer denying access would strangle the business.

f) The decision;

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Judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom. The court may therefore vary its orders when it is proved that; - (i) aspects of
25 the order were erroneously granted; (ii) there is an ambiguity, or a patent error or omission in the order, but only to the extent of such ambiguity, error or omission; (iii) the order was granted as the result of a mistake common to the parties, or the facts on which the original decision was made were (innocently or otherwise) misstated; (iv) circumstances have arisen that render the order inoperative or impracticable. Where there has been a material change of circumstances; (v)
30 or that a certain clause or expression in the Court Order requires precise clarification and/or elaborations; (v) any other sufficient case. In these instances the Court Order will need to be

varied, elaborated on, changed or amended to fit the parties' specific needs or initial intention. The court has a wide discretion to vary or revoke previous orders, but consideration must be given to the finality of litigation and the need to avoid undermining the concept of appeal.

5 The power should not be used to circumvent the important principle that final orders are intended to be final and that the only way to set aside a final order is ordinarily by way of an appeal. It is either interlocutory or continuing orders that may call for variation as they continue. Interim orders or interlocutory orders do not finally decide anything as of right between the parties. They include case management decisions which govern the procedure by which those rights will be determined. In contrast, final orders determine between the parties the issues which are the
10 subject matter of the litigation and which give rise to a cause of action estoppel between those parties. Justice requires that any challenge to final orders is via the appeal process rather than applications for variation or revocation, unless there are exceptional circumstances.

Generally this power will be invoked where the original order was made on the basis of
15 erroneous information or where subsequent unforeseen events have destroyed the basis on which it was made, or where it is necessary for accommodation of a wider constellation of interests. However, given the public policy principle of finality of litigation, it does not automatically follow that where such facts are proved, the order will be varied where it is a final order. It will normally take something out of the ordinary to lead to variation of an order, especially where
20 there has been no change of circumstances. The court will have performed its duty once it made a final order. That being so, save where the court has (exceptionally) retained jurisdiction and power over the performance of final orders, the only route of challenge is by way of appeal or by way of separate proceedings seeking to set aside the order as having been induced by false representations.

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It is not appropriate for an applicant making repeated applications for variation to have "innumerable bites of the cherry" without showing either a material change of circumstances or an obvious mistake in the original decision. Circumstances which were known to and within the control of the party at the material time cannot found a material change in circumstances. It
30 sometimes happens that what was anticipated when a court order was made, does not occur, or the factors upon which it was based have since changed materially or substantially. In both case

the order may have to be varied to reflect the changed circumstances. If the circumstances which were relevant to the making of the original order change in a way that cannot have been predicted, then an application to vary that order can be made.

5 In the instant case, the court on 16th August, 2021 issued an interim measure of protection order restraining the respondents from withdrawing from the 1st applicant's bank accounts held at DFCU Bank, any amount of money exceeding US \$ 60,000 per month in order to meet its operational expenses, until the final conclusion of the arbitral proceedings. The decision was not intended to be final, so as to trigger the doctrine of *functus officio*. Since the issuance of the order
10 and its subsequent variation, the proceedings in LCIA Consolidated Arbitration No. 204602 have been ongoing and the arbitral tribunal has advised that it expects its final award will be rendered any time after 3rd July, 2023. It is the applicant's case that once the arbitral tribunal renders the final award, the interim measure of protection order will lapse and the respondents by themselves or through their agents will proceed to access and utilise the funds remitted by the UETCL into
15 any bank account of the 1st respondent before the final determination of the applicant's appeal in the Court of Appeal, thereby rendering the appeal and the purpose of the freezing order nugatory.

An interim measure of protection is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal or Court orders
20 a party to either (a) maintain or restore the status quo pending determination of the dispute or (b) take action or refrain from taking action so as to prevent imminent harm or prejudice to the arbitral process itself or (c) provide means of preserving assets, out of which a subsequent award may be satisfied or (d) preserve evidence that may be relevant to the resolution of the dispute. Whereas section 6 of *The Arbitration and Conciliation Act* permits any party to an arbitration
25 agreement to apply to the court, before or during arbitral proceedings, for an interim measure of protection, and for the court to grant that measure, it is the respondents' contention that doing so without leave of the arbitral Tribunal in the instant case renders the order illegal. The relevant article of the LCIA Arbitration Rules provides as follows;

30 25.3 A party may apply to a competent state court or other legal authority for interim or conservatory measures that the Arbitral Tribunal would have power to order under Article 25.1: (i) before the formation of the Arbitral

5 Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award. After the Commencement Date, any application and any order for such measures before the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties.

10 This provision recognises the right to apply to Court only before the arbitral tribunal is formed. Unless a tribunal is able to grant provisional measures, its ability to provide effective, final relief may be frustrated, one party may suffer grave damage, or the parties' dispute may be unnecessarily exacerbated during the pendency of the dispute resolution process. Once an Arbitral Tribunal is constituted, an application for interim relief should ordinarily be decided by the Arbitral Tribunal. Otherwise, the application to Court can only be made with the tribunal's permission. That permission is unlikely to be granted in circumstances where the interim relief sought before the court is relief that can be granted by the tribunal. Nevertheless an application for interim measures to a Court without the tribunal's permission may not be deemed incompatible with the agreement to arbitrate or the parties' autonomy because this provision does not oust the jurisdiction of Courts in the grant of interim measures.

20 The Arbitral Tribunal's authority to order interim relief is not exclusive. Courts and arbitrators possess concurrent, coordinate or parallel jurisdiction to grant these types of measures whether the arbitral proceedings have their seat in Uganda or abroad. The concurrent authority, albeit well recognised, is an exception to the principle of arbitral exclusivity and judicial non-interference in arbitration. Courts play a vital complementary role in the arbitral process prior to the commencement of the arbitral proceedings, during their progress and after the final determination of the dispute and the issuance of the final award. Institutional arbitration rules cannot oust the jurisdiction of Courts. A party who proceeds with an application to the court without permission of the Tribunal suffers no legal consequence; only that such a party could be sanctioned by the Tribunal for breach of the institutional LCIA Rules, would risk its reputation with the tribunal, and would also potentially face the prospect of the Court refusing the application, influenced by the rules or on the basis that the arbitration agreement has not been complied with.

The Court though may in its discretion and in aid of the arbitral process, instead of deferring to the remedial powers of arbitral tribunal, conduct its own analysis consistent with the precise requirements of the law of the seat and competently, as it did in the instant case, grant the relief.

5 Parties to an international arbitration agreement may seek interim measures of protection from a national court without thereby either waiving their rights to arbitrate or violating their agreement to arbitrate. Allowing claimants to seek interim relief from Court instead of the Tribunal can be (exceptionally) justified because of the peculiar character of, and necessity for, such measures. In many cases for strategic reasons, including time and costs, flexibility and availability, as well as
10 the need for *ex-parte* relief and formal execution, Court may be more relevant as the forum where to pursue a particular mode of interim relief, where the arbitral tribunal does not have the power and practical ability to grant effective relief within the relevant timescale. In cases where the Tribunal's powers are inadequate or where the practical ability is lacking to exercise those powers, the Court may act.

15

Interim protection has the objective purpose of ensuring that the time needed to establish the existence of the right does not in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it. Article 25 (1) authorises an LCIA tribunal to order specified types of provisional measures (including security for claims,
20 preservation or sale of disputed property, and any other relief which could be made in a final award), subject to contrary agreement by the parties. The purpose of interim measures of protection is to achieve the fundamental objective of every legal system, the effectiveness of judicial protection. However, the Tribunal lacks the capacity to issue interim measures directed to non-parties and its orders of both provisional relief and final relief can only be coercively
25 enforced by proceedings in national courts. If an arbitral tribunal orders provisional measures against a third party, national courts will ordinarily deny recognition and enforcement of such relief on ground that an arbitral tribunal's jurisdiction encompasses only the parties before it. The contractual nature of the arbitral process implies that the tribunal's authority is limited to the parties to the arbitration.

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Furthermore, interim measures often call for immediate relief in order to stop potentially irreparable harm (e.g., the destruction of evidence, transfer of funds or property to third parties). In some cases, the inability of a party to stop such actions will effectively decide the parties' dispute (by default), since meaningful relief will no longer be available after the actions in question are taken. In some circumstances, the only realistically effective forum which can provide interim relief is a local court (where the evidence or property is located). Another major practical difference is the availability of *ex-parte* interim relief, which is traditionally not available in arbitration. Since the tribunal itself lacks the power directly to require compliance with its orders or to punish noncompliance, a party may justifiably seek interim relief from the Court rather than the Tribunal.

Of course, in any case where the Court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the applicant, that the substantive questions are reserved for the arbitrator or arbitrators (see *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] A.C. 334 at 367-368). Courts may not purport to pre-empt or prejudge decisions of the arbitral tribunal on the merits of the parties' dispute. Arbitrators though can feel reluctant to issue interim relief because of the fear of being perceived as prejudging the merits of the matter. This is because in order to grant interim relief, the test must be considered whether the applicant has a reasonable possibility of prevailing on the merits. The courts, on the other hand, do not feel such concern or hesitation when deciding on an interim measure since the merits of the matter will eventually be arbitrated. Even then, not all measures can be provided by arbitrators.

Concurrent jurisdiction provides a forum in the courts to request measures prior to the formation of the tribunal, orders to bind third parties if necessary, and the ability to enforce both its own and arbitral tribunal orders. The Court is the only choice for some types of interim relief where the arbitral tribunal lacks the power, for instance, if the relief sought needs to be enforced against a third party. In the instant case, the relief sought was to be enforced against banks as well, which are neither parties to the submission to arbitration nor the dispute. On the facts of the case, the original application to this Court for the interim relief is not incompatible with the arbitration

agreement. Seeking the variation of the order does not in any way interfere with the parties' autonomy as suggested by counsel for the respondents.

As regards the duration of the order, the aim of interim protective measures is to preserve parties' rights, both substantive and procedural, pending the decision on the merits. Whereas section 6 of *The Arbitration and Conciliation Act* permits any party to an arbitration agreement to apply to the court, before or during arbitral proceedings, for an interim measure of protection, and for the court to grant that measure, it does not prescribe the duration of such orders. Whereas such applications may be made "before or during arbitral proceedings," and they can be granted at any time during the course of proceedings but before the issuance of the final award, and although the length of an interim measure is generally set to cover the duration of the proceedings or for a shorter period, it does not necessarily follow that the order should automatically lapse with the termination of the proceedings; they last for such time as the Court may determine. In the instant case, when the order issued on 16th August, 2021 the Court directed that it was to last "until the final determination of the London Court of International Arbitration LCIA Consolidated Arbitration No. 204602."

Domestic arbitral proceedings are terminated by the final award (section 32 (1) of the Act), withdrawal (section 32 (2) (a) of the Act), termination of the mandate of the arbitral tribunal (section 14 of the Act), by agreement of the parties when they settle the dispute (section 30 (1) of the Act), or by an order of the arbitral tribunal (sections 25 (a) and 32 (2) and (3) of the Act). On the other hand, under LCIA Arbitration Rules, proceedings are terminated by; agreement of the parties when they settle the dispute (article 26.9 of the Rules), abandonment or withdrawal (article 28.6 of the Rules), a final award or additional award (article 27 of the Rules). Therefore, the expression "until the final determination" used by Court in the order of 16th August, 2021 is elastic enough to include any and all of those situations in respect of which a foreign arbitral proceeding before the London Chamber of International Arbitration may be terminated.

Proceedings therefore may not be considered determined until the time allowed for applying for the correction of a final award and rendering additional awards under article 27 of the LCIA Arbitration Rules has elapsed, which is a period of 56 days of receipt of a request to make an

additional award as to any claim, counterclaim or cross-claim presented in the arbitration but not decided in any award, which application must be presented within 28 days of receipt of the final award. This potentially creates a window of up to nearly three months after the date of delivery of a final award, before ongoing proceedings may be considered finally determined. I therefore
5 find that the expression “until the final determination of the London Court of International Arbitration LCIA Consolidated Arbitration No. 204602” implies that the interim measures are to remain in force until the time for making an application under article 27 of the LCIA Arbitration Rules has expired, or that application having been made, it has been refused.

10 It is the applicant’s intention to have the order extended beyond that period, until the final disposal of their pending appeal against the orders of enforcement of the two partial awards, otherwise, it is contended, the appeal would be rendered nugatory. That would in effect turn the interim measure into a post award protective measure. Awards are final and binding on the parties to the dispute. They are subject to the limited post-award remedies provided for in the
15 LCIA Arbitration Rules and in the laws of the seat of the arbitration.

Interim protective measures are decisions that are made prior to a final award, where the relief granted is usually, but not necessarily, designed to protect a party during the pendency of the proceedings, and which are potentially subject to alteration or elimination in the final award.

20 Therefore they may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist. Although section 6 of *The Arbitration and Conciliation Act* is elastic enough to allow the grant of interim measures to protect the subject matter of arbitration “before,” “during,” and even “after” the award is passed but before it is enforced, post-award interim relief. Would in the circumstances of this case be inappropriate considering that the
25 Tribunal is yet to render its final award. After an arbitral award is made, interim relief can only be sought to protect the fruits of the proceedings until the award is enforced.

The purpose of providing interim relief after the arbitral award has been handed down but before it is enforced is to secure its value for the benefit of the party seeking the award’s enforcement.

30 Since a party who is dissatisfied with the arbitral award, i.e. the unsuccessful party, can only seek the setting aside, enforcement of the arbitral award only enures to the benefit of the party that

succeeded in the arbitral proceedings. An unsuccessful party cannot seek post-award interim measures. Post award interim measures cannot be granted in favour of the unsuccessful party because such interim measures would not be in aid of the final relief accruing to the unsuccessful party even after favourable disposal of an application to set aside the award.

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Arbitration is considered to be of no value if its award is not enforceable. Generally, the enforcement of awards represents the conversion of a favourable award into concrete relief for the claimant. A foreign arbitral award becomes enforceable as a decree of this Court only after an application for recognition and enforcement has been made and considered under sections 35
10 and 43 of *The Arbitration and Conciliation Act*; which is after the time for applying to set it aside has expired under the law of the seat, or an application for that purpose at the seat has been dismissed. Stay of enforcement of the Award may be requested during ongoing proceedings at the seat, for the interpretation, revision or annulment or request to make an additional award as to any claim, counterclaim or cross-claim presented in the arbitration but not decided in any award.
15 In light of section 9 of *The Arbitration and Conciliation Act*, it is not within the mandate of this Court to issue post-award measures of protection pending an appeal from an order of recognition and enforcement.

Consequently it appears to me that the purpose of this application will be met when the
20 expression “until the final determination of the London Court of International Arbitration LCIA Consolidated Arbitration No. 204602” contained in the Order attains a precise clarification and/or elaboration. The Court Order will therefore be varied, elaborated on, changed or amended to fit the initial intention, i.e., to preserve the subject matter of the dispute and ensure that it enures to the benefit of the party that succeeds in the arbitral proceedings, hence, until the
25 arbitral award becomes enforceable as a decree of this Court. For that reason the application is accordingly allowed and the order is varied in the following terms, namely;

a) The order of this Court dated 16th August, 2021 and as subsequently varied on 14th October, 2022 is to remain in force “until the final award of the London Court of
30 International Arbitration LCIA Consolidated Arbitration No. 204602 becomes enforceable as a decree of this Court.”

b) The costs of this application are to the applicant.

Delivered electronically this 18th day of August, 2023
Mubiru.....

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.....**Stephen**

Stephen Mubiru
Judge,
18th August, 2023.