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Interim Measures: Attempting to Trace the Line of Deference Shown By English Courts to Arbitral Tribunals

John McKendrick QC

Introduction

1. The use and effectiveness of interim and precautionary measures in international arbitration has gathered apace. The need to prevent the dissipation of the property the subject of the arbitration, the preservation of the relevant evidence and security for costs have all led to increased sophistication in respect of both the arbitral tribunal's jurisdiction and that of the national courts. Added to that the perceived delay in some arbitral proceedings has led to increased attention being given to such measures and resulted in increased use of emergency arbitration.

2. Article 26 of the UNCITRAL Model Arbitration Rules provides a useful guide to interim measures and the circumstances in which interim measures can be granted by an arbitral tribunal. Articles 26 (1) to (3) state:

> 1. The arbitral tribunal may, at the request of a party, grant interim measures.
> 2. An interim measure 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 orders a party, for example and without limitation, to:
> *(a)* Maintain or restore the status quo pending determination of the dispute;
> *(b)* Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 *(a)* to *(c)* shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

3. Noticeably the 2006 revisions declined to explicitly include *ex parte* applications. In the world of commercial litigation, in many circumstances, Worldwide Freezing Orders (WFO) on notice would be largely ineffective with a high risk of dissipation of assets or destruction of property. The London based Chartered Institute for Arbitrators' Guidelines on 'Applications for Interim Measures' provides that arbitral tribunals may grant *ex parte* orders in cases of extreme urgency, where an element of surprise is required or where confidentiality is required to make the order effective. This is subject to there being no bar on *ex parte* interim measures within the arbitration rules or the *lex arbitri*. However, many of the large international arbitral institutions require service of any application for interim measures or relief from an emergency arbitrator to be served on the Tribunal and all parties, thereby precluding *ex parte* applications. For example, SIAC rules at Schedule 1 state: "The party shall, at the same time as it files the application for emergency interim relief, send a copy of the application to all other parties"

4. Further, concerns regarding the enforceability of *ex parte* interim measures persist given many national courts would not enforce an interim *ex parte* measure as being contrary to Article V (b) and (e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on the basis one party was unable to present his case and the award, being interim and subject to a return hearing, is not binding.

5. Notwithstanding this, urgent interim *ex parte* measures which require enforcement out of the jurisdiction, often require the assistance of national courts.

Updated View From the English Courts

6. Under English law, the key provisions are found in section 44 of the Arbitration Act 1996:

> (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
> (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
> (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

7. The decision of Leggatt J in Gerald Metals SA v Timis [2016] EWHC 2327 (Ch) caused some concern that such was the extent of the development of an interim jurisdiction by arbitral institutions the national courts considered themselves less able to intervene. Leggatt J refused an application pursuant to s. 44 Arbitration Act. Setting out the background he commented:

> It is common ground that there can be situations where the need for relief, for example in the form of a freezing injunction, is so urgent that the power to appoint an emergency arbitrator is insufficient and the court may properly act under section 44 of the Arbitration Act – for example if the application is one that needs to be made without notice. On behalf of Gerald Metals, Mr. Diwan QC submits that there is a further gap in the LCIA rules which exists in cases which are not emergencies or of such exceptional urgency as to justify the expedited formation

of the tribunal but which are nevertheless cases of urgency within the meaning of section 44(3) of the Arbitration Act .

8. Before holding that:

> The obvious purpose of Articles 9A and 9B is to reduce the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case. It seems to me that to make commercial sense of the provisions a similar functional interpretation of Articles 9A and 9B needs to be adopted as has been given to section 44(3) of the Arbitration Act . In other words, the test of exceptional urgency must be whether effective relief could not otherwise be granted within the relevant timescale – the relevant timescale for this purpose being the time which it would otherwise take to form an arbitral tribunal. Likewise, under Article 9B the test of what counts as an emergency must be whether the relief is needed more urgently than the time that it would take for the expedited formation of an arbitral tribunal. That, in my view, is the rational interpretation of these rules.
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> 55. Accordingly, it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under section 44 .

9. This has led some to consider opting out of the LICA emergency arbitrator provisions, however, the decision must be seen in context. Before the constitution of the tribunal, Gerald Metals applied to the LCIA for the appointment of an emergency arbitrator, with a view to seeking emergency relief, including an order to prevent one of the parties disposing of assets. The respondent had already responded to the application by giving undertakings not to dispose of any assets other than for full market value and at arm's length, and to give 7 days' notice to Gerald Metals before disposing of any asset considered to be worth more than £250,000. In light of those undertakings, the LCIA rejected Gerald Metals' application for the appointment of an emergency arbitrator.

10. It is likely to be reading in too much to this decision, to detect an unwillingness by the English courts to support arbitration. Indeed it is fairer to say the court's decision properly reflects the parties' agreement to arbitrate and to be bound by the results of arbitration.

The interim relief having been rejected by LCIA, it could have been considered not only surprising but also potentially alarming for the courts to step in.

11. Issues of usurping the arbitral process in respect of interim measures and the proper construction of section 44 (3) were resolved in Cetelem SA v Roust Holdings [2005] EWCA Civ 618. The Court of Appeal held that on a true construction of the Arbitration Act 1996 s.44(3), if a case was one of urgency, the court had jurisdiction to make such orders as it thought necessary, although only for the purpose of preserving evidence or assets. However, the court adopted a wide definition of 'assets' by holding that a contractual right was an "asset" within the meaning of s.44(3). Roust Holdings had argued that the powers in section 44 were in support of arbitral proceedings, whereas no such proceedings had begun and, secondly, that the proposed order would not be in support of arbitral proceedings but an usurpation of the powers of the arbitrator. These arguments were rejected by Clarke LJ (as he then was).

12. The pathway to the English courts for interim relief to support arbitration is a well-trodden one. Such claims are governed by Civil Procedure Rule 62 and involve an arbitration claim form in accordance with the Part 8 procedure. The Commercial Court, whilst mindful of the need to respect the parties' autonomy in submitting themselves to the private jurisdiction of an arbitral tribunal, has shown a determinedness when it comes to enforcing judicial orders.

13. In DP World Djibouti FZCO v Port de Dijbouti SA [2018] EWHC 230 (Comm) Bryan J had to consider whether to grant a preliminary interim injunction to protect contractual rights pursuant to a joint venture agreement which set out the terms of control of a joint venture company, owned by the parties who had agreed to London based arbitration (LCIA). The JV agreement prescribed the circumstance for removal of directors, guaranteed the claimants a majority of directors on the board and provided for the claimant to have a determinative vote on certain prescribed matters. The control of the JV was at stake. The court heard the application on 31 August 2018, and was asked to injunct a shareholder meeting scheduled to take place on 9 September 2018.

14. The application was heard in private on an *ex parte* basis and the injunction was granted. The judge held:

As is now well established, and as is recognised in *Gee On Commercial Injunctions*, supra, the *American Cyanamid* principles are "guidelines" and are not "a straitjacket". Where the function of the court is to hold the position as justly as possible pending trial, with an interim order such as that sought in the present casethe object is to make whatever order will be likely best to enable the trial judge to do justice between the parties whichever way the decision goes at trial. It is submitted on behalf of the claimant that in the present case this involves the maintenance of the *status quo* until the arbitrator can decide the substance of the dispute.

15. The court took a robust view on the interpretation of section 44 (3) and Cetelem:

> As part of the duty of full and frank disclosure, Mr Haydon has drawn to my attention a decision of Males J, *Zim Integrated Shipping Services Limited v European Containers KS & Another* [2013] EWHC 3581, in particular at [24] to [33]. In that case Males J expressed a certain degree of hesitation about whether or not, on the facts of the case, contractual rights are assets within section 44(3). In particular I have regard to what he said at [24]. However, ultimately, albeit he said with some hesitation, he concluded that that was a case which falls within subsection (3) of section 44.
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> In my view, there is nothing within the decision of Males J which calls into question the principles that I have identified from the *Cetelem* case, or which would derogate from the nature of the relief that is sought in the draft order, including paragraph 2.1 of that draft order, if I am otherwise minded to grant that injunction.

16. Males J had refused to grant an injunction in the case of Zim Integrated Shipping Services Limited v European Containers KS & Another [2013] EWHC 3581 essentially because the application for the injunction came to close to determining a matter which parties had agreed should be decided by the arbitral tribunal. Two contractual rights were in play: the first was the applicant's contractual right to repayment of the loans which the respondents refused to pay, saying that they were not liable to do so. The second was a contractual right to deduct monies from a charter hire in event of default.

17. The application was heard on 6 November 2013, with the judge noting from the outset the arbitration was under way and a 3 day merits hearing would begin on 27 January 2014. The court was mindful of the need to respect the arbitral jurisdiction:

> As that decision makes clear and as is in any event apparent from the terms of section 44 as a whole, section 44(3) is intended to be a limiting provision and does not extend to making any kind of interim injunction. It is also an important consideration that an injunction should not usurp the function of the arbitrators. While it may sometimes be necessary, in order to preserve an asset in an urgent case, to determine a question which the parties have agreed that the arbitrators should decide, the court must proceed with caution before making an order which may have that effect.

18. The judge was wary of the expansive definition of assets:

> It seems to me that treating these contractual rights as assets within section 44(3) is stretching that term, if not to breaking point, at all events very nearly to that point. If the subsection does indeed extend so far, then it is difficult to see what real limitation is provided by the limitation that the subsection is only there for the purpose of preserving evidence or assets. That wide interpretation would enable the court, as a matter of jurisdiction, to grant an injunction in a very wide range of cases. However, even if Mr Gee is right to say that the contractual rights to which he refers fall within the concept of "assets" in the subsection, so that there is jurisdiction to make the order, it seems to me that it is at any rate a factor to be taken into account as a matter of discretion that the subsection is more readily to be invoked in the typical case where preservation of assets is being used in a more conventional way. The closer any injunction comes to determining a matter which it is for the arbitrators to decide, the more wary the court should be as a matter of discretion.

19. The judge, in the exercise of his discretion ultimately refused the injunction because:

> I add that my hesitation arises, not only for the reasons which I have given but because, strictly speaking, the court's jurisdiction to make the order would only arise if the claimants do in fact have the assets – ie the contractual rights – on which they rely. Section 44(3) does not refer to possible assets or alleged assets, but "assets". It may be, therefore, that I would have no jurisdiction to make the order sought without first deciding the very question which falls to be decided in the arbitration.

20. In Atlas Power Ltd v National Transmission and Despatch Company [2018] EWHC 1052 (Comm) Phillips J considered whether to continue an anti-suit injunction to restrain the defendant from challenging a LCIA partial final award in Pakistan or England and Wales. The injunction had been granted at an urgent interim *ex parte* hearing. The court had no difficulty in finding that as the seat of the arbitration was in London (s. 3 of the 1996 Act) the *ex parte* relief was entirely appropriate and the interim injunction was made in final form, preventing litigation before the Pakistani in respect of the award.

21. In Schillings International LLP v Christopher Howard Scott [2019] EWHC 1335 (Ch) a dispute existed between a law firm and one of its former partners who had gone on to set up his own business. An interim inunction was granted by Norris J on 8 May 2018 in these terms:

> "Until the end of 30 May 2018 the Respondent must comply with the following clauses of the LLP Agreement:
> a. Clause 21.1.4 in so far as it obliges the Respondent to give a true account of all his dealings relating to the Business and affairs of the Firm since 30 November 2017 with clients, prospective clients, referrers and introducers of work, including:
> i. giving full details of the time, date and content of all communications in so far as those communications are not already on the Firm's document system or recorded on the Firm's mobile telephones;
> ii. giving full details of all media via which he has communicated save for media controlled by the Firm (including email, fileshare app, messaging platforms whether encrypted or unencrypted, cloud based storage facilities or social media); and he shall provide (i)-(ii) above by no later than 4pm on 18 May 2018."

22. The Deputy Judge explained why this order was made:

> At the time when these proceedings commenced in April 2018, there was quite clearly an urgency in the case, because for the reasons given by Norris J, which I have set out above, Mr Scott had newly established a venture, at a time when there was a serious issue to be tried as to whether he remained a member of Schillings, and it was necessary to safeguard against a springboard advantage. Further, there was, at that time, no possibility of seeking immediate relief in arbitral proceedings

as time would not have permitted the appointment of an arbitrator; still further, whilst the grant of injunctive relief was appropriate and necessary, only the court would have been able to grant an injunction. Even so, the application before Norris J was made on the basis, confirmed in the wording of the order made, that Schillings would "proceed with the determination of the dispute between it and [Mr Scott] as expeditiously as reasonably possible pursuant to clause 42 of the LLP Agreement.

23. At the hearing in March 2019, the applicant took the view the respondent had failed to comply with the terms of the order and refused any further relief pursuant to section 44 (3) of the Act to take further steps to secure compliance with the order. His reasons related to the lack of urgency but were also jurisdictional:

> In my judgment, having regard both to the wording of the statutory provisions and the authorities, the absence of urgency alone would have been fatal to the present application since the element of urgency is a requirement for the exercise of the relevant jurisdiction. However, the application must also fail in my judgment for additional reasons. The first of these is also jurisdictional in light of *Cetelem* . I am not satisfied that there is any proper basis for finding that the order sought is necessary for the preservation of evidence or assets. The case advanced by Mr Callman (as encapsulated in his written submissions) for the making of an order was that its "purpose is what it always has been: to obtain the true account and full details to which the Firm is entitled pursuant to the Order of Norris J and the LLP Agreement, both of which [Mr Scott] was bound by." In my judgment there exists no basis for any suggestion that either information or assets will be imperilled if an order is refused.

24. And further, even if he had jurisdiction, the discretion would be exercised against the applicant, because:

> Even if I were persuaded that the court has jurisdiction to deal with the ongoing dispute as to disclosure and production of documents and information, whether by way of an account or otherwise, in my judgment it would be wholly wrong for it to exercise that jurisdiction. It is for an arbitrator, the parties' chosen tribunal, to

decide what documents or information should be provided, and he will have to take into account the necessity for any such relief as is sought, and decide issues of proportionality in relation thereto. It would be wholly inappropriate for the court to step into that domain.

25. The question must be posed whether the Deputy Judge considered in any event that Norris J might have gone further than actually preserving evidence and stepped into the shoes of the arbitral tribunal and set out evidential directions.

Compliance

26. The English courts take compliance with their orders seriously, this includes interim orders.

27. In Alfa Bank v Reznik [2016] EWHC B21 (Comm) Popplewell J had to consider the consequences of a breach by of a failure to comply with an asset disclosure provision of a WFO related to LICA arbitration proceedings. The WFO was in standard terms and required disclosure of all assets exceeding $10, 000. It was not complied with. The claimant sought to have the defendant, a Russian businessman, committed to prison for contempt of court. Mr Reznik failed to attend the hearing. It was adjourned and at the further hearing he once again failed to attend and nor was he represented. This did not deter Popplewell J from making findings to the criminal standard that he had breached the WFO which contained a penal notice. He noted the failure to comply was "an attack on the administration of which usually merits an immediate sentence of imprisonment". Reznik was sentenced to 18 months imprisonment.

28. Importantly, committal orders can be made against directors of a company which is in breach of court orders that contain a penal notice, even if they are against non-British nationals, see for example Dar Al Arkan Real Estate v Majid Al-Sayed [2014] EWCA Civ 715.

29. Furthermore the English courts have taken an expansive view of their discretion to permit various methods of service out of the jurisdiction, even if this would not amount to proper service in the jurisdiction of the country where the respondent is being served. The test is not whether the service is lawful in the recipient jurisdiction but whether or not the method of service is actually illegal or prohibited, see Abela v Baadarani [2013] UKSC 44,

interpreting CPR 60.4 This applies to interim orders, WFOs and applications for committal. The courts routinely permit service out by email. Some might say this is a tenuous basis for the English courts to effect service, but it would seem the judges of the Commercial Court are not to be deterred.

Conclusion

30. The English courts' approach to interim measures related to arbitration can be summarised thus:

    a. urgency grants jurisdiction;
    b. an expansive definition of the preservation of assets and evidence has been adopted:
    c. if the question of whether a party has those assets (or contractual rights) is the very question the arbitral tribunal will determine, the courts are unlikely to assist;
    d. the courts are influenced by the closeness in time to the ability of the arbitral tribunal to determine the issues;
    e. sight must not be lost of the section 1 Arbitration Act 1996 principles when considering s. 44 (3).
    f. if an interim order has been made the consequences of non-compliance can be severe.

"Brexit" Day

31 January 2020