Applications for injunctions in support of arbitrations - the court or the tribunal?

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Introduction

1. Applications for interlocutory injunctive relief in support of arbitrations are becoming an increasingly common feature of the arbitral landscape. Whether the application is to preserve property which is the subject of the claim, preserve evidence, restrain a party from committing a possible breach of contract or freeze a party’s assets, the first question that the applicant needs to consider is where to make his application: in court or before the arbitral tribunal.

2. Answering that question requires consideration of a number of further questions including the following:
   2.1. Does the tribunal have the power to grant the relief?
   2.2. Does the court have the power to grant the relief?
   2.3. If both the court and the tribunal have the power, is it open to the applicant to choose where to make his application or do the arbitral rules and/or the law make the choice for the applicant?
   2.4. If it is open to the applicant to choose the venue for his application, what are the advantages of a court application over a tribunal application and vice versa?

3. In this paper, I will be exploring some of these considerations in the context of international arbitrations with an English seat taking place under institutional rules. There are a large number of different sets of institutional rules. I will be referring in this paper to three of the most common institutional rules, namely the LCIA Rules¹, the ICC Rules² and the UNCITRAL Rules.³

4. The need for injunctive relief often arises at the start of the arbitral process, before the formation of the arbitral tribunal and sometimes even before the commencement of the arbitral process. Until recent developments, the applicant would always make such an application for urgent injunctive relief to the Court under section 44 of the Arbitration Act 1996. However, recent developments in the form of changes to the institutional rules allowing for

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¹ 2014 Rules effective 1 October 2014
² 2017 Rules effective as at 1 March 2017
³ 2010 Rules
expedited formation of tribunals and appointment of emergency arbitrators make the Court route less straightforward. This has been graphically illustrated by a recent decision of the High Court in Gerard Metals S.A. v Timis & Ors [2016] EWHC 2327 (Leggatt J).

5. I will be exploring these recent developments, the issues raised by the Timis decision and the lesson to be learned.

The Relationship between Court and Tribunal

6. Redfern and Hunter in the 6th edition of the Law and Practice of International Arbitration describe the relationship between the national courts and the arbitral tribunals in the following terms:

“The relationship between national courts and arbitral tribunals 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......

To the extent that the relationship between national courts and arbitral tribunals is said to be one of 'partnership', it is not a partnership of equals. Arbitration may depend upon the agreement of the parties, but it is also a system built in law, which relies upon that law to make it effective, both nationally and internationally. National courts could exist without arbitration, but arbitration could not exist without the courts.”

7. In the domestic context, the demarcation of the roles of the national court and the arbitral tribunal is contained in the Arbitration Act 1996 (“the Act”). As explained by the Court of Appeal in Cetelem SA v Roust Holdings Ltd [2005] 1 WLR 3555:

“a central and important purpose of the 1996 Act was to emphasise the importance of party autonomy and to restrict the role of the courts in the arbitral process. In particular, the Act was intended to ensure that the powers of the court should be limited to assisting the arbitral process and should not usurp or interfere with it,”

8. This important purpose is reflected in the Court’s interpretation and application of its powers under section 44 to grant interim relief in aid of arbitral proceedings. Section 44 is considered shortly. However, it is pertinent to note that not only does the Act prescribe the Court’s powers,
it also legislates for the tribunal’s powers subject to the parties’ agreement to the contrary. Thus section 38(1) states that the parties are free to agree on the powers exercisable by the tribunal and sections 38(3)-(6) creates default powers which are subject to agreement to the contrary.

The Tribunal’s Powers to Grant Interim Relief

9. In the case of arbitrations proceeding under institutional rules, the parties’ agreement under section 38(1) will include the powers granted to the tribunal under the institutional rules. In the case of the LCIA Rules, wide-ranging powers are conferred on the tribunal under Article 25 to grant interim and conservatory measures. These include orders for “the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration” and on a provisional basis any relief which the tribunal would have power to grant in an award.

10. These powers are sufficiently wide potentially to cover most injunctive relief available in court proceedings to one party against the other. However, the tribunal’s power to grant relief is subject to the requirement under Article 25 that the respondent to the application has been afforded “a reasonable opportunity to respond.” In practice, this rules out the possibility of an application for an interim measure being made on a without notice basis, such as a without notice application for a freezing order. Without notice applications can only be made, if they can be made at all, to the Court under section 44 of the Act.

11. Similar powers are granted to a tribunal under the UNCITRAL Rules (see Article 26). Expressly included are orders “to maintain or restore the status quo” and orders requiring a party to “take action that would prevent or refrain [it] from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process.”

12. The equivalent provision in the ICC Rules is Article 28 which simply provides that unless the parties have otherwise agreed, the tribunal may at the request of any party “order any interim or conservatory measure.”

13. The rules themselves recognise ‘a carve out’ for applications made to the national court. So, for example, Article 25.3 of the LCIA Rules provides:
“The power of the Arbitral Tribunal under Article 25.1 shall not prejudice any party’s right to apply to a state court or other legal authority for interim or conservatory measures to similar effect: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal’s authorisation, until the final award....”

14. This provision recognises the right to apply to Court only before the arbitral tribunal is formed. 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.

15. The UNCITRAL Rules contain a broader carve out, simply recognizing that a request for interim measures to a judicial authority shall not be deemed incompatible with the agreement to arbitrate\(^4\). The ICC Rules contain a similar provision.\(^5\)

The Court’s Power to Grant Interim Relief

16. As already noted, this power is conferred on the Court by section 46 of the Act. This provides:

“(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are....

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings...

(e) the granting of an interim injunction or the appointment of a receiver.

(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.

\(^4\) Article 26(8)

\(^5\) Article 28(2)
(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......

17. The rationale for section 44 was explained by the Court of Appeal in Cetelem SA in the following terms (Clarke LJ at [71]) and suggests a cautious approach to the exercise of the jurisdiction:

“The whole purpose of giving the court power to make such orders is to assist the arbitral tribunal in cases of urgency or before there is an arbitration on foot. Otherwise it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. 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 claimant, that the substantive questions are reserved for the arbitrator or arbitrators.”

18. The Court’s power under section 44 can be excluded by agreement. It is not uncommon for arbitration agreements to include a Scott v Avery type clause providing that no proceedings in court between the parties shall be commenced prior to the making of an arbitration award. Such a clause will prevent an application to the court for injunctive relief being made by one party to the arbitration agreement against another even where the clause does not expressly state that the Court’s powers under section 44 are excluded. A recent illustration of the operation of such a clause is A v B 2015 WL 09917818 Cooke J.

19. Section 44 only applies in “urgent” cases (absent permission of tribunal or written consent of other parties). Sub-section (5) makes clear that even if the application is urgent, a court will not make an order unless the tribunal has no power or is unable to act effectively.

20. Accordingly, an application to the Court under section 44 can be justified in the following circumstances:

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6 (1856) 25 LJ Ex 308
7 Sub-section (3), as confirmed in Cetelem
20.1. Where the application is an urgent one for injunctive relief (eg freezing order) on a **without notice** basis. In such circumstance the tribunal (even if formed) would not be able to make the order and the requirements of section 44(5) are therefore satisfied.

20.2. Where the application is an urgent one for injunctive relief made on notice and the tribunal has either not been formed or is not in a position to grant relief quickly enough to meet the need for urgency or does not have the power to do so at all.

21. Until recently, it was relatively easy for an applicant to satisfy the requirements of section 44 where the application was made just before the start of the arbitral process or even just after the process had started. Providing urgency was established, the Court would readily accept that the requirements of section 44(5) were met because ordinarily it would take weeks from the date of the request for arbitration for the tribunal to be formed. So for example under the LCIA Rules⁸, the appointment of the tribunal takes place 35 days or so after the request for arbitration has been served.

**Rules for Expedited Formation of Tribunals and Emergency Arbitrators**

22. However, this position has changed as the result of the introduction of rules allowing for the expedited formation of tribunal and for the facility of an “emergency arbitrator”.

23. The current LCIA Rules, introduced in 2014, allow in a case of “exceptional urgency” for the expedited formation of a tribunal by the LCIA Court.⁹ This enables a tribunal to be formed within a few days if the grounds for urgency are established. The rules do not define “exceptional urgency” but the LCIA Notes on Emergency Procedures give some (largely uninformative) examples.

24. Alongside this provision the LCIA Rules have introduced the concept of an “emergency arbitrator”. Article 9B provides that “*in the case of emergency [not defined] at any time prior to the formation or expedited formation of the Arbitral Tribunal...any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (“the Emergency Arbitrator”).*”

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⁸ Article 6.6
⁹ Article 9A
25. The introduction of such provisions has, I suggest, considerable ramifications for applications under section 44. The potential availability of an application to an Emergency Arbitrator in an LCIA arbitration will make it very difficult for an applicant to satisfy the requirements of section 44(5) when applying to the court. Unless the application is so urgent that it cannot wait for, say, three to four days for the appointment of an Emergency Arbitrator and a hearing before him, the court is likely to reject the application on the grounds that section 44(5) is not satisfied.

26. The ICC Rules also now contain provisions for appointment of emergency arbitrators. Article 29 provides that a party that needs urgent interim or conservatory measures may make an application for such measures pursuant to the “Emergency Arbitrator rules” in Appendix V. The latter provides that the timeframe for the appointment of the emergency arbitrator shall be “within as short a time as possible, normally within two days from the Secretariat’s receipt of the Application”.

The Timis Decision

27. What happens if an applicant fails to persuade the LCIA Court that the application for interim measures is urgent enough to justify the appointment of an emergency arbitrator? Can he then make the application for interim measures to the court under section 44 on the grounds that there is no tribunal has been formed? On the basis of the decision of Leggatt J in Gerald Metals v Timis10, the answer to this question appears to be no.

28. The relevant part of the judgment concerned a claim for sums due under a guarantee given by the respondent in respect of liabilities of Timis Mining Corp (SL) Limited. The guarantee was subject to a clause providing for disputes to be referred to arbitration under the LCIA Rules with a London seat. The arbitration was commenced on 8 August 2016. Under the LCIA Rules, the party appointed arbitrators had until 1 October 2016 to appoint the chairman of the tribunal and thus complete the formation of the tribunal.

29. Upon commencement of the arbitration, the claimant applied to the LCIA for the appointment of an emergency arbitrator with a view to seeking emergency relief to prevent the respondent disposing of certain assets. On receiving notification of the application, the respondent offered

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10 [2016] EWHC 2327 (Ch)
certain undertakings to the claimant. On learning of these undertakings, the LCIA rejected the claimant’s application for the appointment of an emergency arbitrator.

30. Following such rejection, the claimant applied on 22 August 2014 to the Commercial Court for urgent relief under section 44, in particular for injunctive relief against the respondent to prevent disposal of the assets in question. It sought to justify the need for relief on the grounds that the undertakings offered in correspondence were insufficient to safeguard the claimant against the risk of dissipation of assets and that an injunction was required together with ancillary disclosure orders.

31. In rejecting the application, Leggatt J held that the requirements of section 44 had not been satisfied. He held, citing *Starlight Shipping v Tai Ping Insurance* \(^{11}\) that the test of urgency under section 44(3) is to be assessed by reference to whether the arbitral tribunal has the power and practical ability to grant effective relief within the relevant timescale. He went on to note and/or decide the following:

31.1. He noted that it was common ground that there can be situations where the need for relief, for example in the form of a without notice freezing injunction, is so urgent that the power to appoint an emergency arbitrator under the LCIA Rules is insufficient. In such circumstances the court may properly act under section 44.

31.2. Whilst the LCIA Rules (Article 9.12) provide that the emergency arbitrator provisions in Article 9B do not prejudice a party’s right to apply to the court for interim relief, the Rules should be interpreted as limiting such right to cases of “emergency” or “exceptional urgency” \(^{12}\) (echoing the words of Articles 9A and 9B) and not just of “urgency”. As the judge explained:

“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)... In other words, the test of exceptional urgency must be whether

\(^{11}\) [2008] 1 Lloyd’s Rep 230
effective relief could not otherwise be granted within the relevant timescale—the relevant timescale for this purpose being the time 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 it would take for the expedited formation of an arbitral tribunal."

31.3. It is only in cases where those powers are inadequate or where the practical ability is lacking to exercise those powers that the Court may act under section 44.

Applications post-Timis: conclusions and lessons to be learned

32. In cases where the institutional rules provide for ability to seek emergency arbitrator, the role of section 44 as a means for one party to an arbitration to obtain an order for interim relief against another is now in my view extremely limited. The court’s power can be exercised on an urgent without notice application (assuming the justification for applying without notice is made out), for example for a freezing order. Aside from this instance and a case where the tribunal does not have the power to grant the relief sought, the court is unlikely to grant an interim injunction or grant other interim relief under section 44 unless persuaded that the application, though on notice, is so urgent that it cannot wait the few days required for an emergency arbitrator to be appointed and an application to be heard by him. Such cases will be few and far between.

33. This limited ambit for section 44 applications may be a matter of concern for applicants for a number of reasons:

33.1. It may turn out in practice to be harder to persuade the LCIA or ICC of “exceptional urgency” on a paper application than it is to persuade the court, with the benefit of submissions at an oral hearing, that the matter is “urgent”.

33.2. Interim measures ordered by a tribunal or an emergency arbitrator are unlikely to satisfy the requirement of finality under the New York Convention to enable enforcement internationally. The interim relief may as a result be less effective and of less value to the applicant than a court order.
33.3. In order to give the order ‘teeth’, it may be necessary to apply to the court under section 42 of the Act. However, this is far from straightforward, requires breach of the order to be established, only applies to peremptory orders and only arises where the applicant has exhausted any available arbitral process in respect of failure to comply with the order.

33.4. The tribunal, which operates as a result of a consensual process where the parties have agreed for their dispute to be resolved by arbitration, may be more reluctant than a court to grant interim measures for wide-ranging relief.

34. These considerations may well cause applicants for interim relief to seek to construct, so far as they legitimately can, an argument for the application needing to be made without notice, when hitherto the application would have been made on notice. Otherwise, the Court is likely to defer to the tribunal or the emergency arbitrator on the question of whether interim relief should be granted.