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CONSTRUCTION, ENGINEERING & INFRASTRUCTURE

Interim Measures in International Arbitration

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Webinar outline

1. When to seek interim relief and factors to consider
2. Courts or emergency arbitrators
3. Obtaining relief during an arbitration
4. Enforcement of interim measures
5. Concluding remarks

When to Seek Interim Measures and Factors to Consider

What is an ‘interim measure’?

- + An order
- + Granted by a court or arbitral tribunal
- + Before commencement of, or during the course of, proceedings
- + Against a party to the proceedings, or against a third party
- + Requiring it to do, or refrain from doing, something
- + Usually on a temporary basis
- + Without notice?

When might you want interim measures?

- + The defendant might dissipate its assets
 - Freezing injunction
- + The claimant may not be able to pay the defendant's costs if it loses
 - Order for security for costs
- + The other party is commencing proceedings in another forum (local courts?)
 - Anti-suit injunction
- + The other party may destroy evidence or property
 - Order for delivery up
 - Search order
- + The other party must do, or refrain from doing, any action
 - Mandatory or prohibitory injunction

Practical example (1): freezing injunction

- + Bringing arbitral claim against a wealthy businessman
- + At the pre-action stage; RFA not yet filed
- + Defendant begins moving assets out of the jurisdiction
- + You want these assets to be preserved until the arbitral award

Practical example (2): anti-suit injunction

- + Bringing arbitral claim against a foreign business
- + RFA filed, but challenges to nominated arbitrators; tribunal not constituted
- + Defendant begins court proceedings in (its) local courts
- + You want arbitration agreement respected, and court proceedings to cease

Practical example (3): witness summons

- + Involved in ongoing arbitral proceedings
- + Approaching witness evidence stage of proceedings
- + You identify a witness within the jurisdiction that can give crucial evidence
- + You want to compel witness to appear before tribunal and give evidence

The common theme in these examples

- + You need relief promptly
 - You cannot wait until the final award

- + You need an order that is enforceable
 - There is no point having a ‘piece of paper’

- + The arbitral tribunal may not be able to act
 - The arbitration hasn’t yet commenced
 - The tribunal hasn’t yet been constituted
 - The tribunal doesn’t have the power to grant the order you seek

Key considerations

- + Can you get the remedy you want?
- + Will you get the remedy you want?
- + How long will the proceedings take?
- + How will you enforce your remedy?
 - What are the penalties for non-compliance?
- + Do you have to give notice to the other side?
- + Are the proceedings confidential?

Your options (1): apply to court

- + You can seek a court order
 - In the jurisdiction where the arbitration is seated
 - In the jurisdiction where the defendant (or third party) is located
 - In the jurisdiction where any assets are located
- + Does the court have jurisdiction?
 - If there is a valid arbitration agreement, will the court ‘step in’?
 - Does the stage of proceedings matter (e.g. has the tribunal been constituted)?
- + Can the court grant the relief you seek?
 - E.g. English courts will not summons a witness outside the jurisdiction
- + Court orders probably have the most ‘bite’
 - Can bind third parties
 - Penalty for failing to comply: contempt

Your options (2): apply to the arbitral tribunal

- + Can you ask the tribunal to grant interim measures?
 - Is the tribunal constituted? If not, can you wait for this?
 - Does the arbitration agreement permit this?
- + Can the tribunal grant the relief you seek?
 - E.g. tribunals cannot bind third parties
- + Will the tribunal grant the relief you seek?
 - E.g. tribunals can be reluctant to grant security for costs
- + Are there procedural concerns?
 - Do you have to give notice of your application?
- + Can you enforce the tribunal's order?
 - Is it an “order” or an “award”?
 - Will you have to go through enforcement proceedings in local courts?

Your options (3): seek an emergency arbitrator

- + Can you ask the arbitral institution to appoint an emergency arbitrator?
 - Do the rules in question permit you to do so?
 - What happens if there is no arbitral institution named?
- + Are you at the right stage of proceedings?
 - Is there no arbitration (RFA not issued)?
 - Has the tribunal not been constituted?
- + Can an emergency arbitrator grant the relief you seek?
 - E.g. arbitrators may not be able to grant freezing orders
- + Are there procedural concerns?
 - How long will the emergency arbitrator process take?
 - Do you have to give notice of your application?
- + Can you enforce an order from an emergency arbitrator?
 - Will local courts view an order as outside the scope of the arbitration agreement?

Should you apply for interim measures?

- + Legally, thresholds for obtaining interim measures can be high
 - Arbitral tribunals may not be able to grant freezing orders
 - Search orders only very rarely granted

- + Order may not get you ‘what you want’
 - Will local courts respect anti-suit injunction?
 - Is it wise to summons an unwilling witness?

Courts or Emergency Arbitrators - England and Wales Perspective

Fundamental principles: Arbitration Act 1996

- + English law generally enforces arbitration agreements
 - Recognizes tribunals' rights to grant interim measures
 - Including emergency arbitrators (according to arbitration agreement / rules)
 - Will enforce such interim measures as are granted
 - Except in specified circumstances
- + English courts will intervene in some circumstances
 - To grant interim measures in support of the arbitral process
- + English courts recognize concurrent jurisdiction on a limited basis
 - In a few cases, you can apply to either a tribunal or the courts
- + Arbitration Act 1996 not based on UNCITRAL Model Law
 - But is influenced by it

Can tribunals grant interim measures?

+ Arbitration Act 1996, s38

- **General powers exercisable by the tribunal**
- (1) *The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.*
- (2) *Unless otherwise agreed by the parties the tribunal has the following powers.*
- (3) *The tribunal may order a claimant to provide security for the costs of the arbitration.*
- *This power shall not be exercised on the ground that the claimant is—*
 - (a) *an individual ordinarily resident outside the United Kingdom, or*
 - (b) *a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.*
- (4) *The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings—*
 - (a) *for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or*
 - (b) *ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.*
- (5) *The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.*
- (6) *The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.*

Tribunals' powers

- + s38 is “non-mandatory”
 - It can be excluded by agreement

- + Check for constraints on the tribunal’s powers
 - In the arbitration agreement
 - In the specified / agreed arbitral rules

- + s38 applies to arbitrations seated in England, Wales and Northern Ireland
 - For arbitrations seated abroad, powers of tribunals determined by law of place of the arbitration

Can the courts grant interim measures?

+ Arbitration Act 1996, s44:

- **Court powers exercisable in support of arbitral proceedings**
- *(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—*
 - *(a) the taking of the evidence of witnesses;*
 - *(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—*
 - *(i) for the inspection, photographing, preservation, custody or detention of the property, or*
 - *(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;*
 - *and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;*
 - *(d) the sale of any goods the subject of the proceedings;*
 - *(e) the granting of an interim injunction or the appointment of a receiver.*

Will the courts grant interim measures?

+ Arbitration Act 1996, s44 (contd...):

- (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.*
- (6) *If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.*
- (7) *The leave of the court is required for any appeal from a decision of the court under this section.*

The English courts' powers

- + s44 is “non-mandatory”
 - It can be excluded by agreement

- + Check for constraints on the courts' powers
 - In the arbitration agreement
 - In the specified / agreed arbitral rules (unlikely!)
 - Tribunal having “exclusive jurisdiction” does not exclude courts' powers

- + s44 applies regardless of the seat of the arbitration
 - But, English courts can be reluctant to step in if arbitration governed by foreign law
 - Particularly if significantly different from English law

Special circumstances: witnesses

+ Arbitration Act 1996, s43:

- **Securing the attendance of witnesses.**
- *(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.*
- *(2) This may only be done with the permission of the tribunal or the agreement of the other parties.*
- *(3) The court procedures may only be used if—*
 - *(a) the witness is in the United Kingdom, and*
 - *(b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.*
- *(4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings.*

Courts or Emergency Arbitrators - Civil Law Perspective

Courts or emergency arbitrators

- + Example:

 - UAE seated arbitration under the DIAC rules

 - You are owed AED 10 million

 - The debtor is getting rid of assets

 - What do you do?

- + Emergency arbitrators- DIAC Rules

- + What about the DIFC-LCIA Rules?

- + UAE Courts?

Courts or emergency arbitrators- Example

- + Precautionary attachment order?
- + UAE Court process
- + Key date: filing within 8 days
- + A settlement strategy?

Courts or emergency arbitrators- the ICC example

- + Same example with ICC Rules
- + Application to ICC President
- + Possible challenge by respondent
- + An interim order or award
- + Enforcement trouble



Courts or emergency arbitrators- What next?

- + Breach of arbitration agreement
- + The UAE Court route
- + The Federal Arbitration Law and Civil Procedure Code
- + Courts the solution?
- + Practical tip



Obtaining Interim Relief During an Arbitration

Obtaining Interim Relief during an arbitration

+ Example:

- Arbitration progresses under the DIAC Rules
- Respondent makes a security for costs application
- The how, the what and to who?

+ UAE seated arbitration or UK seated?

Obtaining Interim Relief during an arbitration- How and Who?

+ How to apply?

- Writing
- Evidence
- Specify the orders sought

+ Courts or arbitral tribunal?

- Kingdom of Saudi Arabia

Obtaining Interim Relief during an arbitration-the UAE story

- + Discretion under the DIAC Rules
- + The Federal Arbitration Law- Art 18 and 21
- + Factors for a tribunal to consider
- + What next?
- + Seeking an interim measure through the court

Obtaining Interim Relief during an arbitration-the UK case

- + Example: London is the seat of arbitration and the ICC Rules apply
- + Respondent's application
- + ICC Rules- Art. 28.1
- + Tribunal decision
- + Interim measures- UK courts (S.44 of the Arbitration Act 1996)

Obtaining Interim Relief during an arbitration

- + Other jurisdictions- Singapore
- + The KSA
 - Hardline position
 - New KSA Arbitration Law

Enforcement of Interim Measures - England and Wales Perspective

Court orders (1): domestic court orders

- + Enforceable immediately

- + Severe penalties for non-compliance: contempt of court
 - Significant financial penalty or jail time

- + Bind third parties

- + But: time-limited?
 - Endure only until Tribunal competent to act (s44(6))?

Court orders (2): foreign court orders

- + Enforceability depends on treaties
 - Need to bring fresh action in local courts?
 - Possibility of re-opening merits of case?
 - Public policy-type issues?

- + Does jurisdiction recognise competence of foreign court?
 - Particularly where there is an arbitration agreement

- + Penalties ‘kick in’ only once order is enforceable
 - Delay can be lengthy

Tribunals' orders (1)

- + Need to bring enforcement action in English courts
 - Has tribunal granted “order” or “award”?
 - Has tribunal granted remedy on interim or final basis?

- + Have procedural requirements been complied with?

- + Penalties ‘kick in’ only once order is enforceable
 - Delay can be lengthy
 - Is a further breach necessary?

Tribunals' orders (2)

+ Arbitration Act 1996, s42

+ **Enforcement of preemptory orders of tribunal.**

- (1) *Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a preemptory order made by the tribunal.*
- (2) *An application for an order under this section may be made—*
 - *(a) by the tribunal (upon notice to the parties),*
 - *(b) by a party to the arbitral proceedings with the permission of the tribunal (and upon notice to the other parties), or*
 - *(c) where the parties have agreed that the powers of the court under this section shall be available.*
- (3) *The court shall not act unless it is satisfied that the applicant has exhausted any available arbitral process in respect of failure to comply with the tribunal's order.*
- (4) *No order shall be made under this section unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time.*
- (5) *The leave of the court is required for any appeal from a decision of the court under this section.*

Tribunals' orders (3)

- + s42 is “non-mandatory”
 - It can be excluded by agreement

- + Check for constraints on the courts' powers
 - In the arbitration agreement
 - In the specified / agreed arbitral rules (unlikely!)
 - Tribunal having “exclusive jurisdiction” does not exclude courts' powers

- + s42 applies regardless of the seat of the arbitration
 - But, concept of “peremptory order” recognised in seat of arbitration?
 - Do rules of arbitral institutions widen or narrow application of s42?

Enforcement of Interim Measures - Civil Law Perspective

Enforcing your interim award- civil jurisdictions

+ From Ukraine to Egypt to the UAE



Concluding Remarks

- + Interim measures- a tool of arbitration not to be underestimated.



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