KEY POINTS

- English courts will readily grant a freezing injunction in support of arbitration where the usual elements for the grant of a freezing injunction are shown and England is the seat of the arbitration.
- An English court may be prepared to make such an order even where England is not the seat of the arbitration, but where there is a sufficient connection between the case and England and international comity can be respected.
- English courts are also prepared to grant freezing injunctions against third parties in support of arbitration proceedings in exceptional circumstances, and to permit service out of the jurisdiction for this purpose in appropriate circumstances.
- Injunctions in aid of enforcement of an arbitral award are also possible. These will be treated in the same way as interim injunctions in support of litigation or arbitration.

Feature

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# Freezing orders in support of arbitration proceedings

This article considers the extent to which the English Court is prepared to grant freezing orders in support of arbitration proceedings both at the interim and enforcement stages with reference to recent case law.

## INTRODUCTION

Anecdotal evidence suggests that arbitration in the financial services sector is increasing, with banks and other institutions taking a more open-minded approach to the insertion of arbitration provisions in agreements with their counterparties than has previously been the case.

In a 2013 survey, Corporate Choices in International Arbitration, carried out by PwC and Queen Mary, University of London (see www.pwc.com/arbitrationstudy)[1] 69% of respondents in the financial sector agreed with the statement that *"arbitration is well-suited for the sort of international disputes encountered in your industry sector"*. 23% of respondents indicated that they had no opinion. Only 8% of respondents disagreed, and no respondent strongly disagreed with the statement. Attitudes may therefore be changing.

The survey also suggests that the primary perceived benefit of arbitration in the financial sector is the expertise of the decision maker, with speed also cited as a perceived advantage. While the benefits of the arbitral process itself are clearly relevant, one area which is sometimes given insufficient consideration is the arbitration environment prevailing at the seat and likely place(s) of enforcement of any award.

Financial institutions in particular would do well to consider the extent to which courts at these places will be prepared to order the protection of assets from dissipation either at the interim or enforcement stage prior to agreeing to arbitration. Without such protections any award may be rendered nugatory.

> Financial institutions [should] ... consider the extent to which courts ... will be prepared to order the protection of assets from dissipation ... prior to agreeing to arbitration.

## THE ARBITRATION ACT 1996 (THE "ACT")

Section 44 of the Act provides the Courts with wide powers to order interim relief while seeking to preserve the fine balance between the powers of the tribunal and the supervisory powers of the Court.

Section 44(1) provides that:

> "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".

The matters listed include the granting of interim injunctions (s 44(2)), which includes freezing injunctions.

As for the circumstances in which injunctions can be granted, the Act distinguishes between cases that are urgent and those which are not. Where cases are urgent, the Court may *"make such orders as it thinks necessary for the purpose of preserving evidence or assets"* (s 44(3)). Where they are not, the Court can only act with permission of the Tribunal or written agreement of the other party (s 44(4)).

In every case, the Court can act only if, and to the extent that, the Tribunal *"has no power or is unable for the time being to act effectively"* (s 44(5)).

The Act further provides that an order made by the Court under s 44 will cease to have effect on the order of the Tribunal (s 44(6)).

## APPLICATION OF S 44 TO FREEZING INJUNCTIONS

To succeed on an application for a freezing injunction in support of arbitration proceedings, then, the applicant must satisfy both the usual requirements to obtain a freezing order and those under s 44 of the Act.

### Requirements for grant of a freezing injunction

The elements required to be shown before a freezing injunction can be granted are

well known (see *Belair v Bassel LLC* [2009] EWHC 725 (Comm), para 19). These are:

- a good arguable case as to the merits of claim;
- whether an order will be effective over the respondents' assets;
- whether there is a real risk of dissipation; and
- whether the granting of an order is just and convenient.

Where a worldwide freezing order (WFO) is sought, the applicant will also have to show additional factors to obtain permission to enforce the WFO abroad. These include that all relevant circumstances and options have been considered, there is a risk of dissipation of assets, and there is a real prospect that the assets are located within the jurisdiction of the foreign court in question (*Dadourian Group International Inc v Simms* (No 1) [2006] 1 WLR 2499).

## Application under s 44

The most common basis on which freezing injunctions are sought under s 44 is that the matter is urgent. The requirement for urgency will be satisfied where there is a risk of dissipation (*Mobil Cerro Negro Limited v PDVSA* [2008] 1 CLC 542), but the Court may also have regard to whether the Tribunal could reach a decision on the point "*in any relevant timescale*" (*Starlight Shipping Co v Tai Ping Insurance Co Limited* [2007] EWHC 1893 (Comm)).

An applicant will also have to show that the Tribunal has no power or is unable for the time being to act effectively (s 44(5)). This requirement is easily satisfied when an application is made prior to a tribunal having been established. Where a tribunal has been established, the issue arises as to whether it has the power to order injunctive relief of the type sought, and the effectiveness of such order.

In *Kastner v Jason* [2004] EWHC 592 (Ch), Lightman J held that s 48 of the Arbitration Act dealing with remedies that could be granted by arbitrators, only applies to final awards. However, s 39 permits powers to be expressly conferred on the Tribunal. Arbitration forum rules frequently do this (see LCIA Rules, Art 25.1(c)). It is unclear whether an English court might make an order even where the Tribunal has such powers expressly conferred on it, on the basis that orders from the Tribunal may not be effective (see *Starlight Shipping Co v Tai Ping Insurance Co Limited* [2007] EWHC 1893 (Comm)).

In view of the above, parties seeking freezing injunctions from the Court in support of arbitration proceedings ought to apply for injunctive relief as soon as possible, and in any event prior to the establishment of the Tribunal.

> Article 2(3) of the Act provides that the powers conferred under s 44 apply even if the seat of the arbitration is outside England ...

## SECTION 37 OF THE SUPREME COURT ACT 1981 (SCA)

Section 37 of the SCA also applies in the arbitration context. It provides simply that the High Court may grant an injunction "*in all cases in which it appears to the court to be just and convenient to do so.*"

Although s 37 is often relied upon in applications for injunctive relief in support of arbitration, it is unlikely that the section confers upon the Court any powers that it would not otherwise have under s 44 (see *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, para 56; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 364B-C).

## WHERE THE SEAT IS NOT IN ENGLAND

Article 2(3) of the Act provides that the powers conferred under s 44 apply even if the seat of the arbitration is outside England and Wales or Northern Ireland and even where "*no seat has been designated or determined*". However, the Court may refuse to exercise such power if in its opinion the fact that the seat is, or maybe, determined to be outside the jurisdiction "*makes it inappropriate to do so*".

The starting point in considering appropriateness is likely to be the statement of Morison J in *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm) at [19], that the natural court for the granting of interim injunctive relief must be the court of the country of the seat of arbitration, especially where the curial law of the arbitration is that of the same country (see also *Russell on Arbitration*, 23rd edition, para 7-183; Dicey, Morris & Collins, para 16-036). The analysis, however, will not stop there.

*Mobil Cerro Negro Limited v Petroleos de Venezuela SA* [2008] EWHC 532 involved an arbitration with its seat in New York, where Mobil alleged that PDVSA had taken steps to dissipate assets in both New York and England following the commencement of the dispute. Walker J found that the Court had jurisdiction to make an order notwithstanding that the seat was in New York, but required a "*sufficient connection*" to be found between the case and this jurisdiction.

Factors that Walker J considered might be relevant to this determination included the presence of assets in the jurisdiction (para 36), or where there is evidence of fraud effecting the defendants (paras 37), but found that these factors were not present in the case before him. Issues of international comity are also likely to be relevant (para 116 to 119, and 135).

A similar issue arose, but in reverse, in *U&M Mining Zambia Ltd v Konkola Copper Mines Plc* [2013] EWHC 260 (Comm). In that case the English court considered whether the claimant was right to apply to the Zambian court for interim relief in support of an arbitration where England was in fact the seat of the arbitration. Blair J found that it was.

In reaching his decision, Blair J acknowledged the general principle set out in *Econet* that the court of the seat is the natural court for the granting of interim injunctive relief against non-parties, but went on to confirm that:

> "a party may exceptionally be entitled to seek interim relief in some court other than that of the seat, if for practical reasons the application can only sensibly be made there, provided that the proceedings are not a disguised attempt to outflank the arbitration agreement" (para 63).

In the case before him, the parties had agreed on the LCIA Rules which expressly provide that the power of the arbitral tribunal to order interim and conservatory measures does not prejudice a party's right to apply to a state court before the formation of the tribunal (LCIA Rules, Art 25.3). Blair J found that this rule implicitly recognised the party's right to do so (paras 67-68).

Blair J was also not persuaded that the English court, or would, make the order sought in any event as the dispute arose between two Zambian companies, concerned the operation of a copper mine in Zambia, and involved a matter of national importance. These factors suggested that the natural forum for the dispute was Zambia not England (para 71).

The case is important in that it highlights that if parties wish to limit the jurisdictions where interim relief may be sought, they should do so expressly in the arbitration agreement, especially where the rules of the chosen forum suggest that an application for interim relief can be made to any court.

The emerging case law also demonstrates that although parties seeking interim relief in support of arbitration should ordinarily apply to the Court of the seat of arbitration, circumstances may exist which justify an application to a different court. The English court, at least, is likely to take a practical approach with respect to such applications.

## FREEZING INJUNCTIONS AGAINST THIRD PARTIES TO THE ARBITRATION

Courts have been prepared to grant freezing injunctions against third parties in support of litigation proceedings for some time.

In *TSB Private Bank International SA v Chabra* [1991] 1 WLR 231, the Court granted an injunction against a company alleged to have acted as an agent or nominee of the defendant on the basis that there was credible evidence that assets that appear to belong to the company were in fact the defendant's assets.

The Court found that an interim injunction was necessary to ensure these assets were available to satisfy a judgment against the Defendant. This jurisdiction is commonly referred to as the Court's "*Chabra jurisdiction*", which has been developed in subsequent cases (see in particular *Cardile v LED Builder Pty Ltd* (1999) 162 ALR 294).

The English court has been prepared to apply these same principles in the context of injunctions in support of arbitration proceedings. In *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* and others 2013 EWHC 422 (Comm), a freezing order was obtained by a Ukrainian bank against English third parties on the basis of the Court's *Chabra* jurisdiction in support of English-seated LCIA arbitration proceedings. The specific allegation was that assets held by these third parties in truth belonged to the Respondent in the arbitration.

Popplewell J summarised the principles that apply to such situations. In short, the *Chabra* jurisdiction may be exercised where:

> "there is good reason to suppose that assets held in the name of a [third party] defendant against whom the claimant asserts no cause of action (the NCAD) would be amenable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a defendant whom the claimant asserts to be liable upon his substantive claim (the CAD)".

The test "*good reason to suppose*" was found to be equivalent to the "*good arguable case*" test (ie, one that is more than barely capable of serious argument) (para 7(1) to (2)).

Popplewell J further explained that a common example falling within the *Chabra* jurisdiction is where there is a good reason to suppose that the assets in the name of the NCAD are in truth the assets of the CAD:

> "Such assets will be treated as in truth the assets of the CAD if they are held as nominee or trustee for the CAD as the ultimate beneficial owner" (para 7(4)).

Moreover, Popplewell J confirmed that the test is not whether the CAD has substantial control over the assets of the NCAD, although that will be a relevant consideration, but

> "whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD" (para 7(5)).

The Judge, however, also confirmed when considering the issue of just and convenient that:

> "The [Chabra] jurisdiction is exceptional and should be exercised with caution, taking care that it should not operate oppressively to innocent third parties who are not substantive defendants and have not acted to frustrate the administration of justice" (para 7(3)).

It follows that while the Court will continue to respect the principle of separate corporate personality, it will be prepared to order the freezing of assets against third parties in support of litigation or arbitration proceedings in appropriate circumstances. Such applications are a useful means to protect assets where there has been an attempt to transfer them elsewhere but the defendant or respondent continues to beneficially own them, although there is a danger, as the Court, recognised in the VAB judgment, that such applications may be used oppressively.

The case ... highlights that if parties wish to limit the jurisdictions where interim relief may be sought, they should do so expressly in the arbitration agreement ...

Feature

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## SERVICE OUT OF THE JURISDICTION

In *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2013] EWHC 3203, the applicant in the earlier case sought to expand the WFO to include another entity, Carlsbad, whose assets were alleged to belong to the respondent in the arbitration. However, unlike the earlier application Carlsbad was a Cypriot company and therefore based outside the jurisdiction. Carlsbad applied to discharge the injunction on a number of grounds. The matter came before Mr Blair J in August 2013.

Among the issues raised was whether there was jurisdiction to serve the WFO out of the jurisdiction and whether, even if there was, there was sufficient connection to England for the Court to exercise its discretion to permit this.

CPR, r 62.5(b) provides that service of an arbitration claim form out of the jurisdiction can be made with permission of the Court where the claim is for an order under s 44 of the 1996 Act. However, there was some uncertainty whether this provision applies only to parties to the arbitration or can apply also to third parties (see *Tedcom Finance Ltd v Vetabet Holdings Ltd* [2011] EWCA Civ 191, CoA).

In this case, Blair J held that although there was no binding authority, *Tedcom* was supportive of the view that "*in a proper case*" there is power to order service out of the jurisdiction under CPR, r 62.5(b) on a defendant, albeit that the defendant is not a party to the arbitration agreement. The Judge further stated that "*this is not a power to [be] exercised lightly*", but went on to allow service on the case before him as the fact that the seat was England and the applicable law of the arbitration was English law provided the necessary connection (para 80). This now settles the matter for the time being, and any further consideration of the issue will have to await a subsequent decision of the Court of Appeal.

Although not ultimately an issue in Carlsbad's application in VAB, CPR, r 6.36 and para 3.1 of Practice Direction 6B may also be relevant to service out of arbitration claims of this sort. Paragraph 3.1 allows service out on a "*necessary and proper party*" to a claim, but it is a matter of some discussion as to whether this provision applies to service on a third party to arbitration proceedings, even where these are seated in England (see *Linsen International Limited v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2399 and EWCA Civ 1042; *Belleti v Morici* [2009] EWHC 2316 (Comm); *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK* [2011] EWHC 2143 (Comm), paras 73 to 98; and Merkin, Arbitration Law (August 2012 update), 19.94).

## FREEZING ORDERS IN AID OF ENFORCEMENT OF AN ARBITRATION AWARD

In England, freezing orders are also possible in aid of enforcement of an arbitral award, although different considerations apply to such a situation compared to where a freezing order is sought to aid execution of a judgment.

In *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040), the Court of Appeal considered the situation where a claimant:

- sought to have an arbitration award recognised as a judgment pursuant to s 66(2) of the Act; and
- applied for a WFO in aid of execution.

The respondent wanted to be able to make interest payments to noteholders and the issue was whether the freezing order should include an "*ordinary course of business*" exception which would allow it to do this.

The lower court found that it was not generally appropriate to include an exception of this type in freezing orders in aid of execution of judgments, and the same should apply to injunctions in aid of enforcement of an arbitral award.

The Court of Appeal disagreed with the analysis. Tomlinson LJ delivered the leading judgment. In this, he found that while it "*will sometimes and perhaps usually be inappropriate to include an ordinary course of business exception in a post-judgment asset freezing order*", a respondent to an award should not be treated for all purposes as a judgment debtor. In the arbitration context, the injunction was to support execution not affect execution, because execution was not available (paras 33 to 35).

The purpose of the injunction was also to prevent dissipation of assets (see *Gidrxslme Shipping Co Ltd v Tantomar-Transporters Maritomos* [1995] 1 WLR 299). Payments of interest by the respondent could not be said to constitute dissipation or an attempt to seek to avoid execution of the award (paras 35 to 38). Something exceptional, therefore, would be needed before a court would exclude an "*ordinary course of business*" exception from an order in such circumstances.

In short, while the Court will be prepared to freeze assets in aid of execution of an arbitral award, it is likely to permit assets to be used in the "*ordinary course of business*" in this context.

## CONCLUSION

The English courts are prepared to take a robust and practical approach to freezing assets in support of arbitration where the usual elements for the grant of an injunction can be shown, and there is sufficient urgency or the parties or Tribunal have given their permission.

While the Court is likely to be most prepared to act where England is the seat of the arbitration, it might also be prepared to do so even if this is not the case, but there is sufficient connection to this jurisdiction.

The Court will also be prepared to grant a freezing injunction against third parties in support of arbitration proceedings where there is good reason to suppose that it has assets which would be amenable to execution of a judgment obtained against the cause of action defendant and to allow service out of the jurisdiction for this purpose in appropriate circumstances.

Injunctions in aid of enforcement of an arbitral award are also possible. These will be treated in the same way as interim injunctions in support of litigation or arbitration. ■

1 I am grateful to Remy Gerbay of Queen Mary & Westfield, University of London, for pointing me in the direction of this study.