ELA ARBITRATION AND ADR GROUP

INJUNCTIONS AND ARBITRATION

Injunctions: How would matters which start with injunctive actions fit with an arbitration? What are the practical issues involved in seeking an interim injunction from the High Court pending a (speedy) arbitration? In what circumstances, if any, could an arbitrator grant an interim injunction? How does this change where the governing law is that of another jurisdiction (e.g. AAA arbitration has an injunctive process inbuilt)?

How would matters which start with injunctive actions fit with an arbitration?

1. Many employment disputes require urgent applications for interim injunctions pending trial, for example, injunctions to enforce port-termination restrictive covenants, springboard relief, or the delivery up of confidential information. The availability of effective injunctive relief may therefore be an important difference between litigation and arbitration.

2. By section 48 (5) (a) of the 1996 Act, unless the parties have agreed in writing, an arbitral tribunal has the same powers to grant final injunctive relief as the Court. (See for example Vertex Data Science Ltd v Powergen Retail Ltd [2006] EWHC 1340 where the parties excluded the power to grant injunctions under s.48). Absent written agreement to the contrary, a tribunal can therefore include in its award permanent injunctive relief.

3. However, as considered below, an arbitral tribunal's powers to grant interim injunctive relief are limited by section 38 of the 1996 Act, and practical limitations such as constituting the tribunal in time to grant effective relief, and the lack of penal sanction for arbitral interim orders.

4. The High Court has – limited - power to grant interim relief in support of an arbitration under section 44 of the 1996 Act but again this can be excluded by the written agreement of the parties. In short, matters which start with injunctive actions do not fit as easily within the procedural limitations of arbitral proceedings than with the menu of injunctive relief that is available from the High Court. In agreements or sectors where disputes are likely to involve interim or final injunctive relief, the parties should consider these limits on the availability of these remedies, and whether their interests are served by excluding the power to grant interim or final injunctive relief.

What are the practical issues involved in seeking an interim injunction from the High Court pending a (speedy) arbitration?

5. In a dispute which is subject to an arbitration clause, the Court has jurisdiction under section 44 of the 1996 Act to grant urgent relief if certain threshold conditions are met. These are:

    a. if the case is one of urgency, and
    b. an order is necessary
    c. for the purpose of preserving evidence of assets.

6. This provides for a very limited role for the Court, and sets up a different, and more difficult hurdle than the American Cyanamid test for interim relief. In practice, the Courts are reluctant to interfere in a dispute which is to be determined by arbitration. Section 44 is

intended only to "*cover over the crack between the moment of the application and the time when the arbitral tribunal can be formed and take its own decisions about preserving the status quo.*"[1]

7. In theory, the Court retains its general jurisdiction to grant injunctive relief under section 37 of the Senior Courts Act 1981 ("the 1981 Act") but "*it is clear that section 37 cannot be used to sidestep or avoid the limitations contained in section 44 of the 1996 Act*"[2]. In principle the parties can agree terms of an arbitration clause which provide that interim relief is to be granted under section 37 of the 1981 Act, free from the constraints in section 44 of the 1996 Act, but only if very clear words are used[3].

8. The practical issues involved in seeking interim relief under section 44 are as follows.

9. First, section 44 distinguishes between urgent and non-urgent cases. In non-urgent cases, the Court can only intervene with the agreement of the parties or the arbitral tribunal. In urgent cases, the Courts will only intervene for the period until the arbitral tribunal is formed. An applicant will still need to act with urgency to establish the tribunal, and may be required to give an undertaking to this effect, only to find that the tribunal lacks the power to continue, or continue as effectively, the interim relief until the final award. The Court's order - and the penal notice - will expire when the arbitral tribunal is seised of the dispute. In practice, the Courts will not look favourably on self-induced urgency, created by an applicant who has delayed in taking steps to constitute the arbitral tribunal. However, where the tribunal is to be constituted imminently, a respondent is able to contend that there is no need for the Court to intervene, as the proper tribunal will soon be seised of the dispute.

10. Secondly, an applicant needs to adduce evidence that an order is necessary to preserve assets which would otherwise be lost in the period before the arbitral tribunal is constituted. The Courts have typically intervened under section 44 when there was evidence of a clear link between the steps required by the order and identified assets; such as where an application needed to be submitted in order to preserve the right to purchase shares[4], or an order was required to prevent termination or assignment of a charter party which would result in the loss of the contractual rights at issue in the arbitration[5]. In employment disputes, the position is rarely this clear cut at the interim stage.

11. Thirdly, an application will need to focus on identifying which "assets" are at risk. A contractual right can be an asset for these purposes[6], and the Courts can act to preserve the value of a contractual right, such that a right to enforce a restrictive covenant could constitute relevant assets under section 44 of the 1996 Act. However, it can be more difficult to fit the full suite of interim remedies available under section 37 of the 1981 Act within the confines of the rubric in section 44 of the 1996 Act.

---

[1] Econet Wireless Ltd v Vee Networks, [2006] 2 Lloyd's Rep 428 at [14]
[2] Zim Integrated Shipping Services Ltd v European Container KS [2013] EWHC 3581 (Comm) [2013] 2 CLC 800 per Males J at [18]
[3] SAB Miller Africa v Tanzania Breweries Ltd [2009] EWCA Civ 1564 at [11].
[4] Cetelem SA v Roust Holdings Ltd [2005] EWCA Civ 618 [2005] 1 WLR 3555.
[5] Zim Integrated Shipping Services Ltd (*supra*) and see also Gerald Metals SA v The Trustees of the Timis Trust and others [2016] EWHC 2327.
[6] Doosan Babcock Limited v Comercializadora de Equipos y Materiales Mabe Limitada [2013] EWHC 3010 (TCC)

12. Fourthly, employment disputes may involve multiple defendants, who are not be subject to an arbitration clause or the constraints of section 44 of the 1996 Act. In such cases, an applicant seeking interim relief will have to consider whether to seek interim relief from the Courts in the ordinary way, in addition to or as an alternative to an application under section 44 of the 1996 Act. Multiple applications and multiple sets of proceedings multiply costs, and practical problems arise from arbitral proceedings running concurrently or consecutively with litigation.

13. Finally, an application under section 44 of the 1996 Act constitutes an arbitration claim under the CPR and so will generally be heard in private and be issued in the Commercial Court.

In what circumstances, if any, could an arbitrator grant an interim injunction?

14. By section 38 (1) of the 1996 Act, the parties may agree what powers the arbitral tribunal may have, including in respect of interim measures. In the absence of such agreement, the tribunal's interim powers pending an award are limited by section 38 (3), (4) and (6) of the 1996 Act to, in summary:

    a. Security for costs;
    b. Inspection, preservation, custody etc. of property; and
    c. Preservation of evidence.

15. In addition to these statutory limitations, there are a number of, significant, practical limitations on the circumstances in which a tribunal can grant relief at the interim stage.

16. The most obvious practical problem is that a tribunal cannot act until it is constituted, and this may be too late for effective urgent interim relief. In particular, an arbitral tribunal is constituted with the knowledge and consent of the parties and therefore ex parte or without notice relief is unavailable, which can be a significant disadvantage.

17. Even when constituted and if the relief sought is within the tribunal's powers, an arbitral tribunal's order is not backed by a penal notice and breach of such order will not engage the sanctions available for contempt of a court order. It is possible for an arbitral tribunal's order to be made subject to enforcement by the Court. However, this requires the tribunal to first make the original order, then, in the event of non-compliance, to make a peremptory order requiring compliance, and in the event of non-compliance with the peremptory order, the tribunal itself may (as an alternative to a range of sanctions available to it to enforce compliance with its own procedures) grant permission for an application to the Court for an order requiring the party in default to comply with its order: section 42 of the 1996 Act. This procedure has obvious practical disadvantages for the party seeking to enforce compliances. First the tribunal must be persuaded to make a peremptory order, and the consent of the tribunal is required before an application can be made to Court upon breach of such order. Secondly, these various hurdles before a penal notice can be applied provide a defaulting party with an opportunity for delay or non-compliance.

    How does this change where the governing law is that of another jurisdiction (e.g. AAA arbitration has an injunctive process inbuilt)?

18. The availability of effective interim relief will depend on the governing rules of the arbitration and the location of the seat of the arbitration.

19. First, where the arbitration is governed by foreign law, specific provision may be made for urgent injunctive relief, as is the case under the American Arbitration Association arbitration rules. It is increasingly common for the rules of arbitral institutions to provide for the appointment of an emergency arbitrator. The role of the emergency arbitrator is to provide a mechanism for prompt resolution of applications for interim measures in cases where the need for such relief is so urgent that it cannot await the appointment of the tribunal. The precise powers of the emergency arbitrator and the nature and scope of the relief available depends upon the specific institutional rules pursuant to which he or she is appointed. For example, article 29 of the ICC rules provide for "Emergency Arbitrator", as do a number of other international institutions such as the Singapore International Arbitration Centre in its 2010 Arbitration Rules, the Arbitration Institute of the Stockholm Chamber of Commerce in its 2010 Arbitration Rules and the International Centre for Dispute Resolution, the international branch of the AAA. A similar mechanism has been adopted by the LCIA in article 9B of the LCIA Rules and by the ICDR in article 6 "Emergency Measures of Protection". The application to the LCIA Court for appointment of an emergency arbitrator must set out "*specific grounds for exceptional urgency*". If the application is granted by the LCIA Court, even a three member tribunal can be constituted in a matter of a few days. Parties who anticipate that their disputes may involve injunctive relief should therefore consider adopting institutional rules which provide for urgent injunctive relief. However, it should be noted that the availability of an emergency arbitrator procedure may affect the availability of interim relief from the court pursuant to the Arbitration Act 1996 s.44, even where the arbitral institution has rejected an application for the appointment of an emergency arbitrator, as was the case in Gerald Metals SA (*supra)* in which Leggatt J refused relief under section 44 in these circumstances.

20. The seat of the arbitration will also effect the ability of the English Courts to intervene in support of a foreign arbitration. By section 2(3)(b) of the 1996 Act, section 44 applies even if the seat of arbitration is outside of England, Wales and Northern Ireland. However, the court may refuse to exercise any such power if, in the opinion of the court, the specific circumstances surrounding the arbitration makes it inappropriate to exercise such power.

21. Section 44 may be used where the arbitration has no connection with the UK but there is a need to protect or preserve an asset in the UK. However, there is a distinction between the exercise of the Court's jurisdiction under section 44 of the 1996 Act pursuant to a domestic law arbitration clause and exercising the same statutory jurisdiction where the seat and governing law of the arbitration are foreign. Where the seat is foreign and there is very little connection to the UK the applicant must show very good reasons why the English courts should grant interim relief pursuant to section 44 of the 1996 Act. A party must show an overriding reason for intervention by the courts, for example, to prevent fraud.

6. Arbitration clauses: Should they be used more standardly in high value employment contracts? What about clauses giving a right to one party (it will usually be the employer) to submit a dispute to arbitration? Does this raise particular issues in the employment context (aside from the obvious one that it will not dispatch statutory claims)?

Currently arbitration clauses are not common in employment contracts. There are benefits to these clauses being adopted in high value matters.

One benefit of a private arbitration is that the dispute will not be heard in a public forum. This feature makes arbitration attractive to parties who do not want commercially sensitive information about their business dealings or the details of how the dispute itself arose in the public domain.

Arbitration can also offer the possibility of a swifter resolution of the matter if the parties agree and diaries of the lawyers and the tribunal permit. The ability to control the arbitral process by agreement can enable parties to make costs savings to the process where appropriate.

Another benefit of using arbitration clauses is that employers can exercise some control over the dispute resolution process. If the arbitration clause requires there to be a tribunal of three and/or the arbitration to have a foreign seat, these factors would often make the employee reluctant to bring a dispute.

If the employee is also a partner/LLP member/shareholder in the company, failure to arbitrate might cause the defaulting director partner to be in breach of the partnership or shareholder agreement, which can affect how much money they receive on leaving their company. The parties may need to give careful consideration to what the arbitration clause does and does not cover in these circumstances. The scope of an arbitration clause in a Partnership or LLP Agreement will be construed in the same way as any other contract, see *Ellis v. Coleman* [2004] EWHC 3407 (Ch), where it was held that the obvious intention of the arbitration clause was to provide that all disputes concerning the partnership should be resolved so far as possible by arbitration rather than by the court.

Therefore whether an arbitration clause should be used will likely depend on the specific requirements of the employer.

Does this raise particular issues in the employment context?

The Employment Rights Act 1996 (ERA) and the Equality Act 2010 (EqA) both prohibit contracting out clauses (including arbitration clauses) where parties seek to prevent statutory rights being relied upon at an employment tribunal. The case of *Van Winklehof v Clyde and Co* [2011] EWHC 668 dealt with this point and it cast doubt as to whether the inclusion of an arbitration clause would be a of any value if an employee refuses to be submit to a dispute being resolved via arbitration.

On joining Clyde and Co, Ms van Winkelhof entered into Clyde and Co's members' agreement. That agreement had a clause in it specifying the steps that would need to be taken in the case of disputes between members and between former members and the firm.

In summary, the clause stated that if a dispute could not be resolved by way of internal procedures or alternative dispute resolution, then the dispute would have to be dealt with by arbitration.

Ms van Winkelhof was expelled from the firm in January 2011. She proceeded to complain that she had been the subject of sex discrimination / pregnancy discrimination and brought a whistleblowing claim.

Clyde & Co tried to enforce the clause in the members' agreement which prevented Ms van Winkelhof from making these claims or at least, to get her to agree to stay her Employment Tribunal claims subject to following the contractual dispute resolution procedures by applying for an injunction.

The High Court refused to grant an injunction on the basis that if a dispute had to be dealt with by arbitration, then any decision made by the arbitrator would be final, and only subject to an appeal on a question of law. This would mean that Ms van Winkelhof would fully lose her rights to any claim in the Employment Tribunal.

Therefore, regardless of the value of an employment contract, it is best practice for an employer to seek an employee's agreement to submit to arbitration proceedings. This decision goes some way to limiting the value of a clause which only gives the employer the right to submit a dispute to arbitration.