

Maritime Arbitration

Topic 9

Enforcing Awards

**SECURITY FOR CLAIMS:
INTERIM MEASURES TO PROTECT
ENFORCEMENT ASSETS**

Difficulties of Enforcement

The decision to refer a dispute to arbitration will inevitably be influenced by the prospects of enforcing any award which may ultimately be obtained. Unless security has been obtained in advance, the process of issuing enforcement proceedings, whether in England or abroad, may be disproportionately expensive or time-consuming, particularly where it is difficult to locate assets. In practical terms it may be pointless to arbitrate if there is no machinery for securing claims.

Ambrose and Maxwell (Ch 18)

“Saisie Conservatoire”

A ship, often the only property of a debtor, may disappear from the oceans, or it may be sold, before arbitration proceedings are terminated. A creditor therefore might be interested to obtain security for his, possibly well grounded, claim before an award is issued. An arrest, to so obtain security, according to many laws is possible. To apply with the ordinary court for an arrest does not appear to conflict with the arbitration agreement though in some countries some doubts are expressed. English law, at least for the last 150 years, has had no process of ‘saisie conservatoire’. The invention of the Mareva injunction ‘the greatest piece of judicial law reform in my time’ (Lord Denning), has completely changed the situation. The list of cases now is long on this subject. In other countries, a ‘saisie conservatoire’ is more or less widely allowed.

J Trappe, 1983

Freezing Injunctions

AA 1996 s 44.— 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—

...

(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 purposes 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.

Freezing Injunctions

- Origin: *The Mareva* (1975) 2 Lloyd's Rep. 137 (previously known as “mareva injunctions”)
- Power conferred by s 37 of the Supreme Court Act 1981 and defined by the Civil Procedure Rules: flexible jurisdiction.
- Domestic vs Worldwide Freezing Injunctions: *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* [2018] EWHC 1539 (Comm)
- An existing and formulated claim is a necessary precondition to the grant of a freezing injunction. An “unformed and inchoate” claim will not suffice: *Fourie v Le Roux* [2007] UKHL 1; Illustration: *The Veracruz 1* [1992] 1 Lloyd's Rep 353.
- A freezing order will be granted more readily after judgment than before, reflecting the policy of the law strongly in favour of the enforcement of judgments: *Griffin Underwriting Ltd v Varouxakis* [2021] EWHC 226 (Comm).

Freezing Injunctions

- The claimant must generally satisfy two basic criteria:
 - that he has a good arguable case (see *Fimbank Plc v Discover Investment Corp* [2020] EWHC 254 (Comm)), and
 - that there is a real risk that assets of the respondent will be removed or dissipated (see *Ivanhoe Mines v Gardner* [2020] EWHC 144 (Comm)).

Even if these criteria are satisfied, the court may refuse the order as a matter of discretion—for example, if the order would interfere unduly with the business interests of the respondent or of third parties: the order sought must be just and convenient: *Arcelormittal USA LLC v Ruia* [2020] EWHC 740 (Comm)

- Court's power may be excluded by agreement, but courts reluctant to interpret agreements broadly so as to reach this result: *Re Q's Estate* [1999] 1 Lloyd's Rep 931; *Toepfer International GmbH v Société Cargill France* [1998] 1 Lloyd's Rep 379; *Petromin SA v Secnav Marine Ltd* [1995] 1 Lloyd's Rep 603.
- Prohibits dealing with, or removal from the jurisdiction of, named assets or a named sum of money.

Freezing Injunctions

- Typically operates over funds retained in a bank account and will “freeze” the account up to a certain limit (usually fixed by reference to the probable amount which the claimant will recover).
- Payments in the ordinary course of business from the frozen accounts are usually permitted.
- Applicants for a “without notice” freezing injunction are subject to certain disclosure duties: *Fundo Soberano de Angola v Jose Filomeno dos Santos* [2018] EWHC 2199 (Comm)
- Could be exercised to prevent the removal of a ship from the jurisdiction in circumstances where an arrest would not be permissible or appropriate: *The Rena K* [1978] 1 Lloyd’s Rep 545; *Bank Melli v Helleniki Techniki SA* [1984] QB 425
- Court has power to make (ancillary) order for disclosure of worldwide assets: *Gidrxslme Shipping v Tantomar-Transportes* [1995] 1 WLR 299
- A party applying on notice to continue a without notice injunction granted under s.44(3), where the urgency had since passed, had to satisfy the requirements of s.44(4): *VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2020] EWHC 72 (Comm)

Exercise

BSG Resources Ltd v Vale SA [2019] EWHC 2456 (Comm)

- V obtained an arbitration award vs B.
- B commenced proceedings to challenge the award on the basis of apparent bias on the part of the arbitrator.
- B went into administration after which B's directors no longer had the power to manage its affairs. Management lay solely with the joint administrators who had a duty to act in the interests of creditors.
- V applied for a freezing injunction in respect of the amount due to it under the award.
- The court refused to grant the injunction.

Why do you think?

Vessel Arrest

- Proceedings in Rem (i.e. brought against a thing) – part of the courts' Admiralty jurisdiction.
- The key purpose of arrest ever since the late 19th century is not to commence Admiralty proceedings but to prompt or compel the provision of security pending judgment in the action: *The Alkyon* [2018] EWCA Civ 2760, [82].
- Commencing *in rem* proceedings for the sole purpose of obtaining security for the claims to be arbitrated will not be regarded as a breach of the arbitration clause: *Fiona Trust v Privalov* [2007] EWCA Civ 20. Can also be done after the arbitration has already commenced: *The Jalamatsya* [1987] 2 Lloyd's Rep 164
- But note that the situation is different if arrest is attempted once an award has already been made – not possible under English law to arrest a vessel in support of enforcement proceedings: *The Bumbesti* [2000] Q.B. 559 cf. *Handytankers v the Ship Alas* [2014] HKCFI 1281(CFI (HK))

Handytankers v the Ship Alas

[2014] HKCFI 1281 (CFI (HK))

- The defendants submitted that the procedure of arrest was not available once a plaintiff's claim had crystallised in a judgment or arbitration award. Article 1(2) of the 1952 Arrest Convention provided that "arrest" meant "the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment".
- However the plaintiffs' claim as pleaded was for damages for breach of, and for unpaid hire under, a charterparty. It was in substance and in form a claim "arising out of any agreement relating to . . . the use or hire of a ship" under section 12A(2)(h) of the High Court Ordinance (Admiralty jurisdiction of Court of First Instance) and not a claim on the award. It was perfectly legitimate for the plaintiffs to invoke the in rem jurisdiction of the court to arrest the vessel and keep her under arrest as security in respect of any judgment which they might obtain after "the hearing and determination of a claim" falling within section 12A of the Ordinance

Vessel Arrest

- The court has discretionary power to order the release of a vessel from arrest, usually upon the provision of sufficient security by the owner: *The Bazias 3 and The Bazias 4* [1993] 2 W.L.R. 854.
- In an arbitration context, where arrest proceedings are stayed, the stay will be on terms that alternative security is provided for the claims being arbitrated: AA 1196, s 11; *Petromin SA v Secnav Marine Ltd* [1995] 1 Lloyd's Rep 603.
- Unlike a party requesting a freezing order, the party making a maritime arrest is not required to give a cross-undertaking in damages. While this is a long-standing rule, the rationale for it today is dubious: *The Alkyon* [2018] EWCA Civ 2760, [82]. See also [84]-[94] for reasons for preserving the rule.

AA 1996, s 11

(1) Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest—

- (a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or
- (b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(2) Subject to any provision made by rules of court and to any necessary modification, the same law and practice shall apply in relation to property retained in pursuance of a order as would apply if it were held for the purposes of proceedings in the court making the order.

Fiona Trust v Privalov [2007] EWCA Civ 20

Clause 41(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred...to arbitration in London, one arbitrator to be nominated by Owners and the other by Charterers, and in case the arbitrators shall not agree to the decision of an umpire, whose decision shall be final and binding upon both parties. Arbitration shall take place in London in accordance with the London Maritime association of arbitrators in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force.

US Law

9 U.S. Code § 8 - Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

SECURITY FOR COSTS

Ambrose & Maxwell Ch 17

In London arbitrations the successful party is generally awarded its costs. An order that one party must provide security for costs (normally in the form of a bank guarantee or P&I Club letter of undertaking) may be granted during the reference to ensure that a successful respondent (or claimant who has successfully defended a counterclaim) will be able to enforce an award of costs with ease. Such an order is typically given to ensure that an insolvent or brass-plate company with no assets within the English jurisdiction is not allowed to pursue a claim in arbitration and yet, if unsuccessful, escape responsibility for the respondents' costs. An order for security for costs not only protects the respondent but may also be an important tactical weapon, as it can bring an arbitration to a halt where a claimant lacks the funds or other financial support needed to put up the security ordered....

The courts have repeatedly stated that security for costs must be granted on a case-by-case basis; individual circumstances must be taken into account in deciding whether it would be fair to order security.... The availability of assets against which an award of costs can readily be enforced by the applicant will usually be the primary consideration in deciding whether an order for security for costs should be made.

AA 1996, s 38(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.

AA 1996, s 41

41.— Powers of tribunal in case of party's default.

(1) The parties are free to agree on the powers of the tribunal in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration.

(2) Unless otherwise agreed by the parties, the following provisions apply.

(5) If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate.

(6) If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.

LMAA Terms

Para 16(c): If a party fails to comply with a peremptory order of the tribunal to provide security for costs, then without prejudice to the power granted by section 41(6) of the Act, the tribunal shall have power to stay that party's claim or such part of it as the tribunal thinks fit in its sole discretion.

Schedule 2, para 7: Applications for security for costs will not normally be considered until after service of defence submission. Any application must be accompanied by a justification for it and a breakdown of the costs which it is reasonably anticipated will be incurred up to the stage of the reference for which security is sought.

ENFORCEMENT UNDER THE NEW YORK CONVENTION

New York Convention 1958 (NYC)

- Applicability in the US governed by Federal Arbitration Act: see US Code, Title 9, Chapter 2. 9 U.S. Code § 208 provides: “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.”
- In the UK applicability is governed by Part III of the Arbitration Act 1996 (Sections 100-104).
- In countries where the NYC is in force, recognition and enforcement proceedings will be broadly similar.

Enforcement Under English Law

66.— Enforcement of the award.

(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

- For distinction between (1) and (2) see: *ASM Shipping Ltd v TTMI Ltd of England* [2007] EWHC 927 (Comm)
- For applicable procedure see CPR Part 62, rules 62.17-62.21
- Foreign award may be enforced under s 66 and converted to English judgment (ss 101 and 104): illustration - *Far Eastern Shipping Co v AKP Sovcomflot* [1995] 1 Lloyd's Rep. 520

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

Enforcement Under English Law

66.— Enforcement of the award.

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

Note: “Action on the Award” at common law, preserved by s 81. See *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd’s Rep 243, 247

Effect of Challenge

- English court has an inherent jurisdiction to “suspend” an English arbitration award pending an application to challenge it, thereby preventing the award from being enforced:
 - *Apis AS v Fantazia Kereskedelmi KFT* [2001] 1 All ER (Comm) 348
 - *Socadec SA v Pan Afric Impex Co Ltd* [2003] EWHC 2086
- But see AA 1996, s 70(6) and (7):
 - The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.
 - The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

Enforcement Under English Law

100.— New York Convention awards.

(1) In this Part a “*New York Convention award*” means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.

(2) For the purposes of subsection (1) and of the provisions of this Part relating to such awards—

(a) “*arbitration agreement*” means an arbitration agreement in writing, and

(b) an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties.

In this subsection “*agreement in writing*” and “*seat of the arbitration*” have the same meaning as in Part I.

Enforcement Under English Law

101.— Recognition and enforcement of awards.

(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

...

(3) Where leave is so given, judgment may be entered in terms of the award.

104.— Saving for other bases of recognition or enforcement.

Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66.

Enforcement Under English Law

102.— Evidence to be produced by party seeking recognition or enforcement.

- (1) A party seeking the recognition or enforcement of a New York Convention award must produce—
 - (a) the duly authenticated original award or a duly certified copy of it, and
 - (b) the original arbitration agreement or a duly certified copy of it.
- (2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

AA 1996, s 103 Refusal of recognition or enforcement

- (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
- (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
 - (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
 - (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
 - (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
 - (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see (4));
 - (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
 - (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

AA 1996, s 103 Refusal of recognition or enforcement

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award. (See also s 81. For an illustration see: *Soleimany v Soleimany* [1999] QB 785).

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

Reading

- L Cao 'Interim measures of protection in the context of arbitration in China' (2005) 8 *Int. A.L.R.* 103
- D C Jackson *Enforcement of Maritime Claims* (4th edn, Informa, 2005), Chapter 13 (available through i-law)
- B D Lord, 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration' (2002-2003) 8 *Ocean & Coastal L.J.* 71 (available from Heinonline) – especially part I.
- P Nacimiento and A Bamashov, 'Recognition and Enforcement of Arbitral Awards in Russia' (2010) 27 *Journal of International Arbitration* 295
- M Payton 'Security for and enforcement of arbitration awards' (2010) 76 *Arbitration* 431
- F Saranovic, 'Rethinking the scope of Freezing Injunctions' [2018] 2018, 37 *Civil Justice Quarterly* 383-405
- L Silberman, 'The New York Convention after Fifty Years: Some Reflections on the Role of National Law' (2009-2010) 38 *Ga. J. Int'l & Comp. L.* 25
- K S Toh, 'Judicial Assistance in Maritime Arbitration' (2006) 18 *SAC LJ* 771 – especially parts III, IV and V