Can only two play that game?

Interim measures and non-parties to arbitrations: A comparative analysis of the approach of the English and DIFC Courts by Daniel Crowley and Timothy Killen of 2 Temple Gardens.

Arbitration is a popular form of dispute resolution because it offers parties a potentially more flexible, efficient, cheaper, and confidential alternative to court proceedings. There are, however, (potential, and actual) limitations to arbitral proceedings; one is the difficulty encountered in pursuing multi-party arbitrations; another – which is the focus of this article – is the potential to seek interim relief (such as freezing orders, interim injunctions, preservation of evidence etc.) against non-parties to arbitrations.

In this article, we consider the position of the Courts of England and Wales and the DIFC, and suggest that there may in fact be scope for the DIFC Courts to provide greater support to arbitral proceedings than their English counterparts.

THE POSITION IN ENGLAND AND WALES

The Courts of England and Wales, exercising their usual powers in court proceedings, may grant interim relief against an individual or company who is not party to such proceedings. One such example is the "Chabra" defendant, so named after the decision in *TSB Private Bank International SA v Chabra [1992]* 1 WLR 231, where the court held that interim relief was available as against a third party, in respect of whom the claimant had no cause of action, but who was holding the assets of someone against whom the claimant did have a cause of action.

Where the English Courts are acting in support of arbitrations, however, the position is far less clear.

The starting point for the Courts of England and Wales acting in support of arbitrations is s.44 of the Arbitration Act 1996 (the "1996 Act") which grants the Court power to order interim measures in respect of:

- The taking of the evidence of witnesses;
- The preservation of evidence;
- Orders relating to property (e.g. samples to be taken or testing to be conducted);
- The sale of any goods the subject of the proceedings; and

» The granting of interim injunctions (including freezing orders etc.) or the appointment of a receiver.

The present issue under consideration is whether the statutory framework set out above allows a Court to order an interim measure against someone who is not a party to the arbitration agreement. If such a power is available, then the Court's reach is potentially very wide, given s.2(3) of the 1996 Act permits the powers in s.44 to be exercised "even if the seat of the arbitration is outside England and Wales …".

In DTEK Trading v Morozov [2017] 1 Lloyds Reports 126, Sara Cockerill QC (now Mrs Justice Cockerill of the English Commercial Court) said of the suggestion that s.44 provided the Court with powers to order interim measures against a non-party, that it was: "*…a controversial question which has been touched on over the years in a number of decisions without being addressed head on.*" (at [12]).

The historic English position is that the Court has been assumed to have such power to order interim measures against a non-party to the arbitration. Recent cases have, however, doubted this and have taken a more restrictive view.

In Permasteelisa Japan KK v (1) Bouyguesstroi; (2) Banca Intesa SpA [2007] EWHC 3508 (QB) at [44], Ramsey J suggested such a power was available when he held that: -

> *"What approach should the court take to the granting of injunctions under s.44(3)? … There are a number of different situations in which the court's powers under section 44(3) may apply. First, it may be asked to grant an injunction against a third party where the arbitral tribunal would have no power…"* (emphasis added)

In *Commerce and Industry Insurance Co of Canada v Lloyd's Underwriters* [2002] 1 WLR 1323 at p.1329 B-C, Moore-Bick J said, in a case where the witnesses were not parties to the arbitration: -

> *"…the court does have jurisdiction [pursuant to s.44(2)(a) of the 1996 Act] to make an order for the examination of witnesses in support of arbitration proceedings, even though the seat of the arbitration is in New York and the curial law of the arbitration is the law of New York."*

In four cases decided in the early part of this decade, the English Courts held or tended towards the view that the English Courts do have jurisdiction to make an order against a non-party:

» *Tedcom Finance Ltd v Vetabet Holdings [2011] EWCA Civ 191*

» *BNP Paribas SA v Open Joint Stock Company Russian Machines [2012] 1 Lloyd's Reports 61;*

» *Western Bulk Shipowning III A/S v Carbofer Maritime Trading APS (The "Western Moscow") [2012] Lloyd's Reports 163;*

» *PJSC Vseukrainskyi Aktsionernyi Bank v Sergey Maksimov [2013] EWHC 3203 (Comm)*

That trend is, however, reversing. In *Cruz City 1 Mauritius Holidays v Unitech Limited [2015]* 1 Lloyds Reports 191, Mr Justice Males reviewed the four cases above and held (albeit obiter) that the "better" view was that s.44 of the 1996 Act does not provide the court with power to grant an injunction against a non-party to an arbitration.

Males J's decision was reached following a careful and thorough analysis of the statutory provisions, and although obiter, it pays to give it some close attention. Males J's opinion was that the 1996 Act did not grant a court power to injunct a non-party to an arbitration as:

First, the words of s.44 tended against such a power, given the opening words of s.44 are "*Unless otherwise agreed by the parties…*". Males J considered that the reference to "parties" in this context was to "parties to the arbitration agreement", rather than parties more generally, and that this suggested that the s.44 powers were intended only to extend to those who had bound themselves to arbitration by consent.

Second, given the s.2(3) extension to s.44 "*…it seems unlikely that Parliament intended to give the English court jurisdiction to make orders against non-parties in support of arbitrations happening anywhere in the world.*"

Third, that the limitations in s.44 that the Court shall only act if the arbitrators have no power or are unable to act effectively (s.44(5)) and that the Court is only to act until the tribunal can take back power (s.44(6)) would be nugatory in the case of a non-party, as there would always be no tribunal.

Fourth, the fact that s.44(7) only permits an appeal from any order under that section with permission from the court of first instance would be "surprising" if it were to apply in the context of an interim measure applied to a non-party as this limited right

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of appeal is justified by the parties to the arbitration having agreed to finality and promptness of decision making when binding themselves to an arbitration clause – the same cannot be said of non-parties.

Finally, Males J noted that the DAC report on Arbitration Law (which preceded the 1996 Act) was not explicit in support of such a power.

In *DTEK Trading v Morozov,* Sara Cockerill QC (as she then was) analysed a number of arguments against the Cruz City view, but ultimately followed the obiter dicta in *Cruz City.*

Notwithstanding its subsequent approval in *DTEK*, the approach taken by Males J in Cruz City has not been without criticism amongst academic commentators. Gee, Commercial Injunctions, 6th Edn. at para. 6-037 for example raises some powerful arguments doubting the correctness of *Cruz City* as follows:

First, s.44(2) of the 1996 Act contains a list of powers which envisage orders being made against a non-party, for example:

» s.44(2)(a) taking of evidence of witnesses. The witnesses are unlikely to be parties to the arbitration;

» s.44(2)(c) orders in relation to property, for example, inspection could be made in respect of property physically held by a third party;

» Further, s.44(2)(c) limits an order authorising any person to enter any premises to "premises in the possession or control of a party to the arbitration". However, there are no equivalent limiting words in s.44(2)(e) which permits the granting of an interim injunction.

Second, paragraph 214 of the DAC Report refers to orders "*that will have an effect on a third party*" and the Chabra jurisdiction had been recognised at the time of the DAC Report.

Third, there would be a lacuna in the law of injunctions in support of arbitrations if injunctions could not be ordered against Chabra defendants.

Finally, orders against non-parties outside England and Wales are matters for the rules governing service out of the jurisdiction and the exercise of discretion, rather than jurisdiction.

Overall, however, and despite this criticism and the earlier case law, the trend in the English Commercial Court in Cruz City and DTEK Trading is clearly against the English Courts ordering interim measures in support of arbitration against non-parties to the arbitration.

THE DIFC COURTS

The position of the DIFC Courts when acting in support of arbitrations is, however, yet to be tested. It is suggested, as set out below, that the statutory framework governing those courts may well allow them to take a more expansive, arbitration-friendly view of their powers to order interim measures against non-parties to arbitrations than the English courts have presently taken.

The DIFC Arbitration Law (DIFC Law No. 1 of 2008) (the "DIFC Arbitration Law"), Article 15 states that *"it is not incompatible with an Arbitration Agreement for a party to request, before or during arbitral proceedings, from a Court an interim measure of protection and for a Court to grant such measure."*

Article 24(3) states that:
"*(3) The DIFC Court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the DIFC, as it has in relation to proceedings in courts. The DIFC Court shall exercise such power in accordance with its own procedures."*

The DIFC Courts have construed Article 24(3) as giving the Court power to issue interim measures in relation to arbitration proceedings in the same way as it could for court proceedings, but only where the seat of the arbitration is in the DIFC *(see, e.g. Brookfield Multiplex v DIFC Investments LLC [2016] DIFC CFI 020 at [25] and [35] and Dhir v Waterfront Properties CFI 011/2009 at [71]).*

Part 25 of the Rules of the DIFC Court lists the interim remedies the DIFC Court can order (at Rule 25.1(10)). Some make no reference to parties or non-parties. Some are specifically directed to parties and some to non-parties. As to non-parties, see, for example: -

> *"(10) an order for production of documents or inspection of property against a non-party"; (emphasis added)*

In addition, in a recent decision of the DIFC Courts it was not doubted that the DIFC Courts – as with the English Courts – can exercise jurisdiction against a Chabra defendant as a result of their usual court powers (see, e.g. Akmedova v Akmedov [2018] DIFC CFI 011, where the jurisdiction was raised, and not doubted).

Given this, and given that the DIFC Arbitration Law does not contain the type of wording limiting interim remedies to parties to an arbitration agreement in the same way that s.44 of the 1996 Act does, it is suggested that it could be open to the DIFC Courts to make an interim order against a non-party to an arbitration, providing the arbitration is DIFC-seated.

CONCLUSION

There is an ongoing debate in England and Wales as to whether a Court can make an order in support of arbitral proceedings against a non-party to an arbitration.

The statutory framework of the DIFC Courts does not contain the same restriction as that in the 1996 Act which has been identified by the English Courts, and so it is suggested it may well be open to the DIFC Courts to order interim measures against a non-party to an arbitration.

It should be noted that this is, however, only a possibility, and enterprising lawyers may use the Cruz City arguments (or similar) to seek to limit the DIFC Courts from exercising such wider powers than the English Courts. Which path the DIFC Courts will choose remains to be seen.

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