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Interim and Emergency Relief - In Support of Maritime Arbitration Under English Law

Clare Ambrose, Michael Collett QC and Karen Maxwell[*]

Parties often need urgent orders in shipping disputes – for example to preserve evidence or assets, or to release goods or to stop one party commencing foreign court proceedings in breach of the arbitration agreement. In that situation a party needs to know what remedies are available and most appropriate. It will have to decide whether to go to court or an arbitral tribunal. This paper will address these questions and outline the basic framework where a party seeks injunctive relief regarding a claim subject to a London arbitration clause. It will highlight the boundary between the court's powers and those of the tribunal, in particular identifying the basis for interim remedies granted by the court or a tribunal and the practical advantages (and limitations) of such remedies.

Particular attention is given to the most important practical remedies available by way of injunction from the English court, the anti-suit injunction and the freezing order. This paper will consider how the court (and London tribunals) approach applications for these remedies and what changes may emerge in light of Brexit.

I. Introduction to Injunctions: Powers of the Tribunal and The Court and The Interaction Between Them

Injunctions are orders requiring a party to do or refrain from doing something. They come in many forms, e.g. final or interim, negative or mandatory, anti-suit injunctions, anti-arbitration injunctions and *quia timet* arbitrations (given to prevent a threatened act).

An important distinction must be drawn between final injunctions which can be made in the form of an award and can be enforced in the same manner as a judgment[1] and interim injunctions which are a form of interim relief, usually regarded as temporary pending a final decision. Under LMAA Terms the tribunal cannot grant interim injunctions unless, exceptionally, the parties agree on this.[2] LMAA arbitrators do, however, have wide powers to make procedural directions relating to property, samples and preservation of assets[3] so that this limitation will rarely affect the ordinary conduct of an arbitration; it only usually arises where urgent and immediately enforceable orders are needed. Further, occasionally maritime disputes may be arbitrated under institutional rules which do confer the power to grant interim relief on the tribunal, such as the LCIA Rules (2020)[4] or the ICC Rules (2021).[5]

Where the parties have chosen to refer disputes to London arbitration an immediate issue arises as to whether relief must be obtained from an arbitral tribunal or whether it is possible or

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[1] *Gazprom OAO* Case C-536/13 (CJEU) [2015] 1 Lloyd's Rep 610.

[2] *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230. This remains the case under the LMAA Terms 2017.

[3] s38, 1996 Act.

[4] Art.25.1.

[5] Art.28.1.

necessary to go to a local court or to the English courts. The English court will require the applicant to establish that it has jurisdiction to consider the dispute (typically for the purpose of justifying service on a party outside England and Wales) and also to provide an undertaking to compensate the other side if the injunction turns out to be wrongly granted.[6] Where parties apply to a tribunal, jurisdictional issues may also arise as to whether the tribunal has power to grant the relief sought.

Even if a party gets its "foot in the door" by establishing that the court or tribunal has jurisdiction, the granting of injunctions is always a matter of discretion (under English law it is an equitable remedy) so there will be a separate issue as to whether the court or tribunal considers it appropriate to grant an injunction. The usual discretionary factors will be whether the injunction is required as a matter of justice, whether damages would be an adequate remedy, whether the applicant has established a serious issue to be tried on the merits, and whether the balance of convenience favours an injunction.

1. The Source of Power to Grant Injunctions

Power to grant an injunction under English law is now based on statute in all but the most exceptional cases. As a basic summary, the courts have general power to grant injunctions under section 37 of the Senior Courts Act 1981, which states the power of the court to grant injunctions "in all cases in which it appears to the court to be just and convenient to do so". This general power exists notwithstanding the more specific rules relating to injunctions laid down in section 44 of the Arbitration Act 1996 ("the 1996 Act"), which gives the court power to make interim orders "for the purposes of and in relation to arbitral proceedings" provided certain conditions are fulfilled.

Most anti-suit injunctions (and anti-arbitration injunctions) are granted under the general power conferred on courts by section 37.[7] However, most other types of injunction relating to arbitration will be governed by the statutory rules laid down under the Arbitration Act 1996. Section 44 expressly provides for the English court to grant injunctions under specific conditions, e.g. where there is urgency and to the extent that the tribunal is unable to act effectively. Its most common application is in freezing orders (discussed below).

In jurisdictional disputes (e.g. disputes as to whether there was any agreement to arbitrate) the courts may be reluctant to allow a party to use an injunction application to bypass the statutory scheme laid down under sections 30-32 of the 1996 Act for determining such issues.[8] However, section 72 of the 1996 Act allows a party to use an injunction application to resolve jurisdictional disputes as an exception where a party has taken no part in the arbitration. Anti-suit injunctions are another means to resolve jurisdictional disputes outside the ordinary scheme of the 1996 Act, although their primary purpose is to avoid disputes going to a foreign court in breach of a disputed arbitration agreement.[9]

Under the 1996 Act, tribunals have the same powers as courts to grant final injunctions.[10] However, the Tribunal's power to grant injunctions derives solely from the agreement to

[6] See, e.g., *Re Bloomsbury International Ltd* [2010] EWHC 1150 (Ch).
[7] *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889 [48].
[8] *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm), [2016] 2 Lloyd's Rep 130.
[9] *AES Ust-Kamenogorsk Hydropower Plant*.
[10] s48(5), 1996 Act.

arbitrate and it can only bind parties to the arbitration agreement or those claiming under that agreement (e.g. assignees). Further, as already noted, the tribunal's powers are subject to a significant restriction in that the tribunal does not have power to grant provisional interim relief unless agreed.[11]

2. Practical Advantages and Drawbacks of using the Tribunal for Injunctions

In some cases it may be quicker and substantially cheaper to seek injunctive relief from the tribunal since it is not necessary to start separate court proceedings and an award can be enforced under the New York Convention. The parties will also be using their chosen tribunal who will provide continuity for every stage of the dispute. However, there are some substantial disadvantages and restrictions in seeking injunctions from a tribunal as compared with a court:

1. If the tribunal is not yet constituted then it will take some time to obtain orders.
2. Under LMAA Terms, the tribunal cannot grant temporary interim injunctions unless the parties agree otherwise.
3. Arbitral tribunals will rarely be willing to grant interim relief without notice (i.e. *ex parte*) and this can be useful where a party with notice might dissipate assets or otherwise pre-empt the court's order. Such emergency relief with limited notice is only available where there is specific agreement (e.g. ICC and LCIA rules).
4. An injunction granted by a tribunal will not bind a third party such as a bank or warehouse.
5. A tribunal's injunction will not be backed by the court's coercive powers, e.g. to commit for contempt for non-compliance.
6. A tribunal's interim injunction is probably not enforceable as an award under the New York Convention or otherwise.[12]

3. The Court's Approach to Applications for Injunctions: The Interface with Arbitration

Due to the reasons given above it will often be both necessary and more appropriate to go to court to obtain an interim injunction. The requirements of section 44 of the 1996 Act provide statutory guidance as to when the court can intervene to provide an injunction but they do not define the court's jurisdiction.[13]

The basic test as to when the court should intervene, as reflected by section 44, is that the English court will support the arbitral process (whether arbitration has started or not) where such intervention is necessary to give effect to the arbitration agreement but it should not usurp the tribunal's role. This means the court will often be reluctant to decide the parties' substantive rights in an application for an injunction and may only be willing intervene to the minimum extent required to maintain the status quo.[14] The usual discretionary factors applicable to the grant of interim injunctions will apply and the requirements of section 44 must be taken into account. If the parties have agreed to confer emergency powers on the tribunal (or to allow for

[11] s39, 1996 Act.
[12] Unless there is specific legislation enabling enforcement, e.g. the Singapore International Arbitration Act (Cap 143A) was amended with a view to enabling enforcement of orders made by emergency arbitrators.
[13] *AES Ust-Kamenogorsk Hydropower Plant*.
[14] E.g. *VTB Commodities Trading DAC v JSC Antipinsky Refinery* [2020] EWHC 72 (Comm), [2020] 1 WLR 1227, *Barnwell Enterprises Ltd v ECP Africa* [2013] EWCH 2517, (Comm) [2014] 1 Lloyd's Rep 171.

emergency arbitrators) this may affect the court's jurisdiction to intervene under section 44 and its willingness to grant an injunction.[15]

Parties may frequently apply to a foreign court for interim relief. Success in that court will depend on local law. Going to a local court may commonly be accepted as consistent with the choice of English law and London arbitration (e.g. arresting a vessel for the purpose of seeking security against an award).[16] However, parties sometimes seek interim relief from a foreign court for the purpose of obtaining a "home advantage" and undermining the choice of a neutral forum for arbitration. In that situation the other side may protect its position by seeking anti-suit relief from a London court of tribunal (see below). A claim for damages from the arbitral tribunal may also be another response to unlawful or inappropriate attempts to obtain relief from a foreign court.[17]

II. Anti-Suit Injunctions, Including Anti-Arbitration Injunctions

An anti-suit injunction is an order requiring a party not to commence or continue legal proceedings, or to discontinue them. Such orders are most often made in relation to foreign court proceedings, but may occasionally relate to arbitral proceedings (an "anti-arbitration" injunction). The remedy is available to enforce or protect a legal or equitable right not to be sued, or where the other party's conduct is vexatious or oppressive.[18] Any order is directed against the party, not the foreign court or the arbitral tribunal.

Foreign proceedings are often commenced to obtain a perceived procedural or substantive advantage, such as proceedings in a "home" jurisdiction or the application of a more favourable liability regime (such as the Hamburg Rules rather than the agreed Hague/Hague-Visby Rules).

1. Who May grant an Anti-Suit Injunction

As noted above, an English arbitral tribunal cannot grant interim injunctions unless the parties have agreed to confer such a power on it[19] and the LMAA Terms do not contain any such agreement. Accordingly, in most maritime disputes, an interim anti-suit injunction would have to be sought from the English Court rather than from the tribunal. In the less usual case where the tribunal does have power to grant interim relief, the applicant would have a choice between applying to the court or the tribunal (unless the arbitral rules preclude an application to court, as may be the case under the LCIA Rules). The decision would be influenced by the considerations referred to at section I.2. above. In addition, it may be relevant whether the court can restrain proceedings in EU or Lugano Convention states following the UK's exit from the

[15] *Mace (Russia) Ltd v Retansel Enterprises Ltd* [2016] EWHC 1209; *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch) (both involving LCIA Rules).
[16] See, e.g., *Kallang Shipping S.A. Panama v Axa Assurances Senegal (The Kallang)* [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep.124 [78].
[17] *West Tankers v Allianz SpA* [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103.
[18] *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 625, [2009] QB 503 [46], [48], [52], [99]; *Michael Wilson & Partners Ltd v John Forster Emmott* [2018] EWCA Civ 51. There is a theoretical question whether such orders are always based on a substantive right.
[19] s39, 1996 Act.

EU, whereas there is no such restriction on tribunals.[20] This will depend on whether the jurisdictional rules are extended following the end of the transitional period.[21]

Tribunals can, and not infrequently do, grant anti-suit injunctions by way of final (rather than interim) relief.

2. Basis for Granting an Anti-suit Injunction

An anti-suit injunction is most commonly sought in maritime matters where foreign proceedings are brought in breach of a London arbitration agreement. As the court's power is based on section 37 of the Senior Courts Act 1981, it is not necessary for the applicant to satisfy the preconditions in section 44 of the 1996 Act.[22]

The applicant for an interim anti-suit injunction has to show, on the material relied upon at the interlocutory hearing, a "high degree of probability" that there was a relevant arbitration agreement.[23] In maritime cases, the question often arises whether the London arbitration agreement in a charterparty has been incorporated into a bill of lading. Provided that the words of incorporation in the bill of lading refer specifically to an arbitration agreement, the English Court is prepared to manipulate the language of the charterparty arbitration agreement (if necessary) so that it applies to disputes between the cargo interests and the carrier,[24] and to incorporate a dispute resolution clause which does not only provide for arbitration (such as a hybrid court/arbitration clause).[25]

Unless there is a good reason why it should do otherwise, the court will hold parties to the negative promise in the arbitration agreement not to bring foreign proceedings.[26] Questions of comity play a small role where a party has agreed to arbitration, in part because the foreign court is only involved because the party has sought to involve it, contrary to its contractual obligations.[27]

The rejection by a foreign court of a jurisdiction challenge is generally irrelevant to the question of whether or not an anti-suit injunction will issue, unless the foreign court is bound to apply the same principles as the English court and has applied those principles in coming to its

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[20] See the discussion (in the context of the LCIA Rules) in *Nori Holding Limited v Public Joint-Stock Company Bank Otkritie* [2018] EWHC 1343 (Comm).

[21] There remains considerable uncertainty: Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021 -https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals-from-1-january-2021 (accessed 6.12.20).

[22] *Southport Success SA v Tsingshan Holding Group Co Ltd (The Anna Bo)* [2015] EWHC 1974 (Comm), [2015] 2 Lloyd's Rep 578 [25].

[23] *Transfield Shipping Inc. v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB) [52].

[24] *The Delos* [2001] 1 Lloyd's Rep 703 (Comm); *Caresse Navigation Ltd v Zurich Assurances Maroc (The Channel Ranger)* [2014] EWCA Civ 1366, [2015] Q.B. 366.

[25] *YM Mars Tankers Ltd v Shield Petroleum Co (Nigeria) Ltd* [2012] EWHC 2652 (Comm).

[26] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 (CA). Damages are unlikely to be an adequate remedy. In some circumstances the remedy may take the form of a mandatory injunction requiring discontinuation of the foreign proceedings (eg *Nori Holding Limited v Public Joint-Stock Company Bank Otkritie* [2018] EWHC 1343 (Comm)), though this will be refused as a matter of discretion where the party in breach has applied to stay those proceedings: *Sam Purpose AS v Transnav Purpose Navigation Limited* [2017] EWHC 719 (Comm)

[27] *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230 [44]

decision.[28] Nevertheless, an injunction should be sought promptly and before the foreign proceedings are too far advanced.[29] In several recent decisions, an injunction has been refused on the grounds of delay.[30] Submission to the jurisdiction of the foreign court will also be a good reason why an interim injunction should not be granted, but only if the submission is voluntary applying English conflicts of law rules.[31] The Court also has discretion to refuse an injunction on the grounds that the applicant has 'unclean hands'.[32]

It has been suggested that the fact that the claim has become time-barred in the contractual forum (for example, under the Hague-Visby Rules) is relevant to the court's decision, if the respondents can show that they did not act unreasonably in failing to preserve their right to sue in the contractual forum.[33] However, the decisions on which this suggestion is based were concerned with the relevance of a time-bar to a stay of proceedings or permission to serve out of the jurisdiction, not the grant of anti-suit injunctions. It is arguable that, unless there has been inequitable conduct by the applicant, the expiry of a time-bar in the contractual form is not relevant in itself to whether an anti-suit injunction should be granted to restrain breach of an arbitration agreement (given that it would not preclude other remedies, such as damages for breach of the arbitration agreement).

3. Brexit

Following the decision of the European Court of Justice in *The Front Comor,*[34] it was no longer possible for an English court to grant an anti-suit injunction restraining a party from commencing or continuing proceedings before the courts of an EU member state or a contracting state of the Lugano Convention. However, the position may change once the transition period marking the United Kingdom's departure from the European Union comes to an end. The rules will depending on the nature of the jurisdictional arrangements which then apply in relation between the UK and EU member states and Lugano Convention states.[35] If

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[28] *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 (Comm) 99.
[29] *The Angelic Grace* 96.
[30] *Transfield v Chiping* [2009] EWHC 3629 (QB); *ADM Asia-Pacific Trading PTE Ltd v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm); *Magellan Spirit ApS v Vitol SA (The Magellan Spirit)* [2016] EWHC 454 (Comm), [2016] 2 Lloyd's Rep 1; *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 Lloyd's Rep 360 (anti-enforcement injunction, discussed in *Team Y&R Holdings Hong Kong Limited v Joseph Ghossoub* [2017] EWHC 2401 (Comm))); *Essar Shipping Ltd v Bank of China Ltd (The Kishore)* [2015] EWHC 3266 (Comm), [2016] 1 Lloyd's Rep 427; *Nori Holding Limited v Public Joint-Stock Company Bank Otkritie* [2018] EWHC 1343 (Comm) However, in *Qingdao Huiquan Shipping Company v. Shanghai Dong He Xin Industry Group Co Ltd* [2018] EWHC 3009 (Comm), Bryan J held that delay of just over one year did not justify refusal of an injunction, where the foreign court had not considered the question of jurisdiction. See also *XL Insurance Co SE v Little* [2019] EWHC 1284 (Comm) and *Daiichi Chuo Kisen Kaisha v Chubb Seguros Brasil SA (The Southern Explorer)* [2020] EWHC 1223 (Comm), [2020] 2 Lloyd's Rep. 137.
[31] *Advent Capital v. Ellinas Imports-Exports* [2005] EWHC 1242 (Comm), [2005] 2 Lloyd's Rep 607 [78]; *Pan Ocean Co Ltd v China-Base Group Co Ltd* [2019] EWHC 982 (Comm), [2019] 2 Lloyd's Rep. 335 [39]-[54].
[32] *Royal Bank of Scotland plc v. Highland Financial Partners LLP* [2013] EWCA Civ 328 [159].
[33] *Verity Shipping SA v NV Norexa (The Skier Star)* [2008] EWHC 213 (Comm), [2008] 1 Lloyd's Rep 652; see also *Times Trading Corp v National Bank of Fujairah (Dubai Branch) (The Archagelos Gabriel)* [2020] EWHC 1078 (Comm), [2020] 2 Lloyd's Rep. 317. In *Grace Ocean Private Ltd v. Cofco Global Harvest (Zhangjiagang) Trading Co. Ltd* [2020] EWHC 3343 (Comm) [47], the applicant gave a time-limited undertaking not to rely on a time-bar if the foreign proceedings were withdrawn and London arbitration commenced.
[34] *Allianz SpA v West Tankers Inc* Case C-185/07, [2009] 1 Lloyd's Rep 413; see also (confirming the position under the Recast Brussels Regulation) *Nori Hoding Ltd v Public Joint Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm).
[35] For discussion of the possibilities, see Sara Masters QC and Belinda McRae, *'What does Brexit mean for the Brussels Regime?'* 33 JIArb Special Issue (2016) 483-500. The state of play as at February 2019 is explained by

the United Kingdom enters into arrangements based on the Brussels I Regulation or Lugano Convention, it is probable that the restriction will persist.

4. Anti-Arbitration Injunctions

An anti-arbitration injunction is an order requiring a party not to commence or continue arbitral proceedings. The court's power to make such an injunction is derived from the same sources as in relation to anti-suit injunctions. However, the power is generally exercised much more sparingly.

The court can make an injunction restraining the pursuit of arbitration proceedings, even if the seat of the arbitration is in another jurisdiction. If there is no dispute that the parties made an arbitration agreement with a foreign seat, and the dispute concerns the scope of that arbitration agreement, then the general approach is that the jurisdictional issue should be determined first by the tribunal (in accordance with the principle of *kompetenz kompetenz*). If the tribunal's decision is not accepted, it should usually be challenged before the court having supervisory jurisdiction over the dispute (normally the court of the seat). However, there may be situations which fall outside of that pattern, where the court will be willing to grant an injunction, albeit by their nature thay are likely to be "exceptional".[36]

III. Emergency relief, including freezing injunctions, orders to preserve evidence, and relief from a foreign court

1. Freezing injunctions

Freezing injunctions are one of the most potent weapons available to a claimant. A freezing injunction restrains a respondent or potential respondent from dealing with named assets – usually funds in a bank account.[37] They were formerly referred to as *Mareva* injunctions, after the case in which they came to prominence.

A freezing injunction operating over the respondent's assets will, clearly, enhance the prospects of successful enforcement of any award. Freezing injunctions can also be a useful means of identifying the location and nature of assets. More generally, obtaining a freezing injunction can be tactically advantageous and maximize the chances of settling the underlying dispute.

a. Power to grant freezing injunctions

A claimant in a maritime arbitration may obtain a freezing injunction from the English court in support of arbitration. Although, in theory, it is arguable that[38] the parties may agree to confer on the tribunal power to grant freezing relief, in practice such agreements are rare in the

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Elizabeth Williams and Thomas Bowen, *Jurisdiction and Governing Law after a No Deal Brexit - the state of play* http://www.elexica.com/en/legal-topics/dispute-resolution-commercial/140219-jurisdiction-and-governing-law-after-a-no-deal-brexit-the-state-of-play (accessed 26.2.19).

[36] *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWHC 1927 (Comm), [2015] 2 Lloyd's Rep 231 [23]-[26]; *Sabbagh v Koury* [2019] EWCA 1219 (Comm)

[37] Though the jurisdiction extends to all types of assets, including for example shares, physical property, loans/debts and land.

[38] There is some doubt as to whether such an agreement would be recognised under the 1996 Act: see, e.g., *Kastner v Jason* [2004] EWCA Civ 1599, [2005] 1 Lloyd's Rep 397.

maritime context[39] and, in any event, the practical problems with enforcing injunctive relief granted by tribunals means that applying to court is more effective.

As discussed above, the court's power to intervene is conferred by section 44 of the Arbitration Act 1996 and section 37 of the Senior Courts Act 1981.[40] Section 44 is available even where an arbitration is seated outside England – though, in practice, the English court will need to be persuaded that there is a sufficient link with the jurisdiction, and may very well take the view that the courts of the seat are the natural forum for consideration of the appropriate interim measures.[41] The court's power under section 44 is non-mandatory and can be excluded by agreement – again, in practice, this would be unheard of in the maritime context.

The potential difficulties that may arise from the existence of emergency arbitrator provisions (see above) do not arise frequently in the context of maritime arbitration, where emergency arbitrators are not commonly provided for.[42] In most cases, therefore, the English court will not be constrained by arguments relating to the tribunal's ability to grant equivalent relief.

b. Making the Application

Freezing injunctions are very frequently sought, and granted, in support of maritime arbitrations seated in England. The application is usually made to the Commercial Court in London. Applications are almost invariably made without notice, often before arbitral proceedings have been commenced – though post-award applications in support of enforcement are also possible. Very urgent applications can be heard out of court hours by means of a telephone application to the duty judge.

In (very) broad terms, the applicant must establish three criteria: that it has a good arguable case on the merits,[43] that there is a real risk of dissipation of assets, and that it would be just and convenient to grant relief.

The application must be supported by affidavit evidence. It is crucial that claimants appreciate that, in making a without notice application, they are subject to a duty of full and frank disclosure. In other words – the claimant must disclose to the court any facts, matters or legal principles material to the exercise of the court's discretion. Failure to make full and frank disclosure may result in the freezing injunction being set aside, regardless of the underlying merits of the claim to injunctive relief, and may further result in adverse costs orders and liability under the undertaking in damages.

The claimant should use the standard form Commercial Court draft order[44] and must inform the court if any amendments have been made.[45]

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[39] e.g., the LMAA Terms do not include any such provision.
[40] Although arguably the section 44 power is not available post-award: *AES Ust-Kamenogorsk Hydropower Plant*: the case was concerned with jurisdiction to grant anti-suit relief but arguably this aspect of the reasoning would also apply to the court's power to grant freezing injunctions.
[41] e.g., *Econet Wireless Ltd v Vee Networks* [2006] EWHC 1568 (Comm), [2006] 2 Lloyd's Rep 428; *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2014] EWHC 3250 (Comm).
[42] Though note that the LCIA does carry out a certain amount of maritime arbitration (particularly shipbuilding disputes): the LCIA Rules include provision for emergency arbitrators.
[43] Of course, the court will not take any final view on the merits as this falls within the competence of the tribunal.
[44] Appendix 5 of the Admiralty and Commercial Courts Guide.
[45] Admiralty and Commercial Courts Guide para F15.5.

If the court grants the freezing injunction on a without notice basis, the order will provide for a "return date" at which the respondent may present its arguments (though in practice freezing injunctions are often continued by consent or are replaced by bank guarantees). The order will in any event provide for any party affected by the order (including third parties such as banks) to apply at any time to vary or discharge it.

The freezing injunction will incorporate an undertaking in damages on the part of the claimant. This is because, if an order is made on a without notice application, and it later turns out that the order should not have been made, the respondent may have suffered loss as a result. The only means of compensating the respondent for that loss is to require the claimant to provide an undertaking in damages. The court will usually require the undertaking to be "fortified" by means of a bank guarantee or other security.

It is apparent from the foregoing that, although freezing injunctions are often sought on an emergency basis, it is very important to ensure that the evidence is prepared carefully, that full disclosure of material matters is made, and that the undertaking in damages is in a form acceptable to the court.

c. Effect of the Order

The order will generally restrain the respondent from dealing with named assets up to a monetary ceiling. However, the order will also usually provide for the respondent to continue to dispose of or deal with any of his assets "in the ordinary and proper course of business".

A freezing injunction is a useful tool in aid of enforcement of an existing or future arbitration award. However, it does not, technically, constitute security for the claim (cf ship arrests). It will not give the claimant any priority over other creditors. The order operates *in personam*, against the named respondent, rather than by way of attachment over an asset. (Of course, where a respondent offers a guarantee or bond in order to avoid or discharge an injunction, the end result, for practical purposes, is that the underlying claim is secured.[46])

The freezing injunction will bind third parties who are given notice of the order. Therefore, any bank served with the order will potentially find itself in contempt of court if it breaches, or assists in a breach of, the order.

A freezing injunction will very often require the respondent to disclose the existence and location of its other assets. This type of "ancillary order" can provide a very useful means of identifying assets (such as further bank accounts, trade receivables, debts etc) which may be susceptible to enforcement and execution. If necessary, further detailed or more stringent orders (for example, requiring individuals to attend for cross examination, or requiring the respondent to inform the claimant and the court when specified monies are received[47]) may be made.

The court's powers are not limited to assets within the jurisdiction: worldwide freezing injunctions may be granted in support of arbitration.[48] However, there are higher hurdles for a

[46] See e.g. *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769.
[47] e.g., *Bitumen Invest v Richmond Mercantile Ltd FZC* [2016] EWHC 2313 (Comm).
[48] *U&M Mining*.

claimant to overcome, and the court is unlikely to take into account potential delays in enforcement overseas when assessing whether a risk of dissipation has been established.[49]

d. Injunctions Directed to Third Parties/Chabra Jurisdiction

In the context of court proceedings, it is possible to make orders restraining third parties from dealing with assets, where those assets may be available to satisfy judgments made against the defendant (e.g. because the defendant beneficially owns the assets or they would otherwise be available for enforcement). It is not entirely clear whether such orders are available in the arbitration context, though the weight of authority currently favours the view that section 44 of the Arbitration Act 1996 does not extend this far.[50] It may be possible to obtain *Chabra* relief under section 37 of the Senior Courts Act 1981, subject to establishing jurisdiction against the third party, which may not be straightforward.

2. Orders to Preserve Evidence or Property

It may be appropriate to seek orders requiring evidence to be preserved. Section 38(6) of the 1996 Act confers such power on the tribunal. Section 38(4) also empowers the tribunal to make orders relating to property which is the subject of the arbitration, including orders for preservation, sampling, testing, photographing and custody.

Orders of this type will be characterised as procedural directions rather than awards. Therefore, they cannot be enforced as awards. If a respondent fails to comply with the tribunal's direction, the first step is to request a peremptory order from the tribunal pursuant to section 41 of the 1996 Act. The peremptory order will specify a time for compliance with the order. If the respondent continues to breach the order, then a number of limited sanctions (such as costs orders or drawing adverse inferences) are available to the tribunal under section 41(7). The claimant may also apply to the court for an order requiring the respondent to comply with the peremptory order (section 42):[51] failure to comply with such an order would place the respondent in contempt of court, and the appropriate court-enforced sanctions would be available.

If there is an urgent need to preserve evidence or property before the tribunal is appointed, then the English court may intervene pursuant to its general powers conferred by section 44. The usual requirements will apply.

3. Relief from Foreign Court

Of course, such orders are not exclusively available from the English court. Similar remedies may be available from the courts of jurisdictions where assets or evidence are located.

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[49] e.g., *IOT Engineering Projects Ltd v Dangote Fertilizer Ltd* [2014] EWCA Civ 1348.

[50] *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704, [2015] 1 Lloyd's Rep 191; *Dtek Trading SA v Morozov* [2017] EWHC 94 (Comm), [2017] 1 Lloyd's Rep 126; *Benhurst Finance Ltd v Colliac* [2018] 6 WLUK 641, *Trans-Oil International SA v Savoy Trading KP* [2020] EWHC 57 (Comm)*;*
but cf *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2013] EWHC 422 (Comm), *A and B v C, D and E* [2020] EWCA Civ 40 (section 44(2)(a) held to provide court with jurisdiction to make orders binding third parties in connection with taking of evidence of witnesses)

[51] e.g. *John Forster Emmott v Michael Wilson & Partners Ltd* [2009] EWHC 1 (Comm), [2009] 1 Lloyd's Rep 233; *Pearl Petroleum Company Ltd v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm), [2016] 1 Lloyd's Rep 441.

Generally, the English court will take the view that it is the courts of the seat that should assume primary responsibility for supportive orders. If remedies are sought from overseas courts then this should be disclosed in any application made to the English court, so that the court is in a position to take an informed view.

IV. Conclusion

There is a formidable armoury of interim and emergency relief available in support of London maritime arbitration, but it is necessary to identify whether the contemplated relief is available from the tribunal or the court (and if from both, which would be more advantageous). Brexit will not affect the enforceability of orders from the tribunal, but it may influence the scope of available anti-suit relief to include once more proceedings in EU and Lugano Convention states. There is likely to be some uncertainty in the meantime regarding jurisdiction and recognition of judgments which may mean that parties are more inclined to rely on the arbitral tribunal.