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Arbitrators

CIArb

Guideline 2: Interim measures of protection

1. Introduction

1.1 Section 38(4) of the English Arbitration Act 1996 entitles the arbitral tribunal, on the request of any party, to order interim measures of protection unless the parties have expressly agreed in writing to the contrary.

1.2 Section 38(4) was a new power when the 1996 Act came into force. Section 38 provides that the arbitrators will automatically have certain specific powers unless the parties have expressly agreed to the contrary. Even if there has been no such express agreement it is possible that some institutional or other arbitration rules may overlap, or conflict with it. The powers granted to the arbitrators by this section are discretionary in nature. Arbitrators are not bound by the provisions of the Civil Procedure Rules or case law concerning how or when a court will exercise similar powers.

1.3 It should be remembered that interim measures of protection ordered by the arbitral tribunal may be unenforceable against third parties, and may be buttressed by insufficient sanctions even as against a party. In such circumstances a concerned party would do better to make an application to a competent court under s44: *Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep. 371.

2. Powers under Section 38(4)

2.1 Section 38(4) empowers arbitrators to give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings. In this respect, 'property' includes an identifiable fund of money, but does not include security or damages claimed. Arbitrators will exercise the powers granted to them by this section in order to protect or preserve the property of one of the parties, which is a subject of the dispute. It is clear that arbitrators may only give directions in respect of property which is a subject of the proceedings and is either owned by or possessed by one of the parties.

2.2 Such directions will be appropriate where one of the parties to the reference requires immediate assistance or where the circumstances of the case demand that the arbitrators take action in order to protect or preserve the property that is the subject of the proceedings. Such a direction will not be final and is reversible at a later date.

2.3 An order under section 38(4) is provisional in nature. It does not finally decide any issue between the parties. Section 47 deals with partial awards, ie final decisions on part of a claim. The arbitrator cannot use section 47 to make a provisional conservatory order. This creates problems with the enforcement abroad of such an award

3. Comparative view

3.1 Article 17 of the UNCITRAL Model Law contains a very similar provision which has been reproduced in Section 25(4) of the Swedish Lag Om Skiljeman (Arbitration Act) and section 1041(1) of the German ZPO:

"Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

3.2 Article 183(1) of the Swiss LDIP is in almost identical terms. Section 2GB of the Hong Kong Ordinance provides for arbitrators to have similarly broad powers.

3.3 Neither the US Federal Arbitration Act nor the French NCPC gives give any such powers expressly to the arbitrator. However, there has never been much doubt that an arbitrator has them. In France, this is

due to Article 1494(2) which gives the arbitrator to power to fix his own procedure in the absence of any agreement by the parties.

3.4 By contrast, Article 818 of the Italian Codice di procedura civile forbids arbitrators from issuing attachments or other interim measures of protection.

3.5 Article 23(1) of the ICC rules operates in a very similar way to the UNCITRAL Model Law:

“Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate. “

3.6 Equally, Article 26 of the UNCITRAL Rules says:

“At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.”

3.7 The detailed provisions of rule 28 of ACICA (Australian Centre for International Commercial Arbitration) (described more fully in Guideline 1) entitle the arbitrator to make an order to “(a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm; and ... (d) preserve evidence that may be relevant and material to the resolution of the dispute”.

3.8 Rule 28 goes into considerable detail on how the arbitrator should deal with such an application. The party requesting the measure must show that irreparable harm is likely to result if the measure is not ordered that substantially outweighs the harm likely to result to the party affected by the proposed measure and that the requesting party has a reasonable possibility of succeeding on the merits. The requesting party must promptly disclose in writing to the tribunal any material change in the circumstances on which the application or its granting was based. The tribunal can modify, suspend or terminate any of its own interim measures at any time upon the request of any party and in exceptional circumstances, on its own initiative. The arbitrator can subsequently make orders for costs or damages with respect to any measure that he or she subsequently decides should not have been ordered.

3.9 Overall, the powers given to the arbitrator by section 38 of the English Act find echoes elsewhere in important arbitration statutes. We have no reason to think that the guidelines which follow could not equally be applied elsewhere.

4. Types of power under Section 38(4)

4.1 Section 38(4) provides that arbitrators have the power to give directions

(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert, or a party, or

(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.

4.2. The arbitrators must check that the parties have not excluded the powers automatically granted to them in terms of Section 38. Otherwise, the powers are extensive, covering all forms of property, notably shares in a company: *Emmott v Michael Wilson & Partners Ltd (No 2)* [2009] 1 Lloyd's Rep. 233, and even a vessel: *Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2008] 1 Lloyd's Rep. 371.

4.3 The burden of proving the need for a direction rests upon the applicant, but the standard may vary depending on the consequences such a direction may have upon the other party to the proceedings. Such directions should only be issued if the arbitrators consider it to be fair and just in all the circumstances and with due regard to commercial common sense.

4.4 The usual Section 33 duties of arbitrators apply to the giving of directions under Section 38(4). Accordingly, arbitrators should give both parties a fair opportunity to put their cases as to whether it would be appropriate for the direction to be issued.

5. Matters to consider when deciding whether to give directions in relation to the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert, or a party

5.1 A distinction needs to be drawn between directions relating to the inspection and photographing of property, and an application for directions relating to the preservation, custody or detention of the property by the tribunal, an expert or a party. An application for the detention of the property can potentially cause the other party a greater degree of harm than an application for the inspection or photography of the property.

5.2 By granting a direction for the preservation, custody or detention of property the arbitrators should take particular care to ensure that an injustice is not caused. Although a direction is reversible, the arbitrators should be aware that in some circumstances such a direction could compel the party affected to abandon the arbitration. The preservation or detention of property may have seriously adverse consequences for a party that needs to sell or use the property concerned. The arbitrator may prefer to order inspection, observation, samples or experiments instead. The tribunal may decline to make an order in view of the hardship likely to be caused and the lack of alternatives.

6. Matters to consider regarding an application for directions relating to the inspection and photographing of property

6.1. Arbitrators should only order the inspection and photography of the property if they are satisfied that it is relevant and necessary to the case and the results are likely to provide significant evidence relating to a substantial point in issue in the case.

6.2. Arbitrators should not allow an applicant to use this process to delay or increase the costs of the arbitral proceedings or impose an unreasonable burden on the other party. This is particularly relevant where there are limited sums at stake or where the cost of complying with the order may be significant.

7. Matters to consider regarding an application for directions relating to the preservation, custody or detention of the property by the tribunal, an expert or a party

7.1. There should usually be clear evidence that the party against whom the direction is sought is likely, unless restrained by the direction, to dispose of or otherwise deal with the property in dispute in such a manner as to deprive the applicant of the ability to present the case properly or the benefit of any award obtained. Arbitrators should be persuaded that the circumstances of the case and the grounds supporting the granting of the relief outweigh the grounds favouring denial of the relief.

7.2. Arbitrators may wish to consider the relative financial position of the parties to ensure that one party will not be substantially disadvantaged if the direction causes the arbitration to be abandoned. In this respect, the likely financial hardship to be caused to both parties will have to be considered.

7.3. Arbitrators could consider whether a cross-undertaking to pay damages, from the party seeking the direction, is appropriate to protect the interest of the other party.

7.4. No direction should normally be made for delivery of a party's tools of trade or stock-in-trade, so as to prevent him carrying on his lawful business.

8. Matters to consider when deciding whether to give directions ordering that samples taken from any observation be made of, or experiment conducted upon, the property.

8.1 Since a direction ordering that samples be taken, or observations be made of, or experiments be conducted upon the property is not likely in most cases to cause the other party a great degree of harm, the arbitrators need only to consider the same principles that are applicable to an application for directions relating to the inspection and photographing of property. These two principles have been set out above.

8.2 Nevertheless, the tribunal should be aware of the time that sampling and experiments can take, the possibility that damage may be caused, and the consequent risks to the parties' general interests of making orders of this type.