

IN SUPPORT OF MARITIME ARBITRATIONS (PART 2): THE COURTS' POWERS TO PRESERVE EVIDENCE, PROPERTY AND ASSETS AND ORDER ATTENDANCE OF WITNESSES

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Our first article in this three-part series on the courts' supportive powers in LMAA arbitrations considered the use of anti-suit injunctions to enforce arbitration agreements providing for arbitration in London. In this article, we discuss the courts' powers under the Arbitration Act 1996 ("AA 1996") to preserve evidence, property and assets and order the attendance of witnesses in LMAA arbitrations.

"The English courts retain the power to make certain orders in relation to the preservation of evidence and assets under section 44 of the AA 1996 where "the arbitral tribunal...has no power or is unable for the time being to act effectively" or the parties and/or tribunal agree that the court may intervene and to order the attendance of witnesses under section 43."

The default position under the AA 1996 is that it is for the tribunal to determine matters of procedure. This is restated in the LMAA Rules 2021 ("LMAA Rules"), which provide in clause 15(a) that *"it shall be for the tribunal to decide all procedural and evidential matters, but the tribunal will where appropriate have regard to any agreement reached by the parties on such matters"*. Notwithstanding this, the English courts retain the power to make certain orders in relation to the preservation of evidence and assets under section 44 of the AA 1996 where *"the arbitral tribunal...has no power or is unable for the time being to act effectively"* or the parties and/or tribunal agree that the court may intervene and to order the attendance of witnesses under section 43. The powers conferred on the courts under sections 43 and 44 apply even if the seat of the arbitration is outside England or no seat has been determined, but in such cases the court will consider whether it is appropriate to intervene.¹

Whilst the courts' powers under section 44 are limited in order to prevent the parties from usurping the role of the tribunal, in circumstances where the tribunal is yet to be constituted or the relief required falls outside of the tribunal's powers, the court can play an important role in supporting the arbitral process.

However, section 44 (which is a non-mandatory provision of the AA 1996) has been described as *"one of the most difficult provisions in the Act"*,² having generated a number of decisions and there are certain issues, such as whether the courts' powers extend to orders against third parties, which remain largely unsettled by the courts.

I. Orders for the preservation of evidence and property

Where there is an evidential dispute and there is a concern that evidence will be destroyed or will deteriorate, one party may apply to the tribunal or the court for access to the property or for the property to be preserved. A common example is where there is a dispute between an owner and charterer over the condition of the vessel and the charterer has been denied access to crucial evidence on board the vessel, such as the vessel's logs or equipment and machinery.

Under section 38(4) of the AA 1996 the tribunal may give directions for *"the inspection, photographing, preservation, custody or detention of property"* and order samples to be taken or other tests carried out *provided that* the property is the subject of the proceedings or in respect of which any question arises in the proceedings and is owned by or is in the possession of one of the parties. However, such an application will often need to be made on an urgent and *ex parte* ('without notice') basis to be effective. This will not be possible if the tribunal is not yet constituted and the LMAA Rules do not provide for the appointment of emergency arbitrators or for expedited appointments.

Even if the tribunal is constituted, save in exceptional circumstances, the LMAA Rules require the applicant to provide the other party with at least three days' notice otherwise *"any application that has not previously been discussed with the representatives of such other parties and that does not fully record the rival positions of the parties will normally simply be rejected by a tribunal"*³.

In circumstances where the tribunal has no power or is unable to act effectively, the parties may apply to the courts for an order under section 44 of the AA 1996. Section 44(1) provides the courts with the same powers to make orders in respect of the preservation of property as the court would have in relation to legal proceedings. This means that a party to the arbitration can apply to the court under section 44(2) for orders in respect of, *inter alia*:

- the preservation of evidence;
- the inspection, photographing, preservation, custody or detention of or the taking of samples or testing of property which is the subject of proceedings or as to which any question arises in the proceedings (often referred to as a "Vasso Order") *"and for that purpose authorising any person to enter premises in the possession or control"* of one of the parties; and
- the sale of goods which are the subject of proceedings (which can be particularly useful where the goods are prone to deterioration).

However, section 44 cannot be used by the parties to compel early disclosure where there is no real risk of the evidence being destroyed or lost.⁴ Further, the courts' powers are limited by sections 44(3)-(5) which provide that, in cases of urgency, the court may make such orders as it thinks necessary to preserve evidence or assets (section 44(3)), otherwise the court shall only act where an application is made with the permission of the tribunal or the agreement of the other parties (section 44(4)). In either case the court will only act if or to the extent that the arbitral tribunal lacks power or is unable for the time being to act effectively (section 44(5)).

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In *Cetelem SA v Roust Holdings Ltd*,⁵ the Court of Appeal clarified that this means that in urgent cases the court may **only** make an order under section 44(3) if it is “*necessary for the purpose of preserving evidence or assets*”. If a different order is sought under section 44(2), then the court can only act where an application is made with the permission of the tribunal or the agreement of the other party. However, the Court of Appeal also held that “*assets*” included contractual rights, thereby broadening the circumstances in which applications could be made under section 44(3).

II. Injunctive Relief

If there is a concern that the defendant in arbitral proceedings will hide or dissipate assets to avoid complying with an award, the claimant may consider applying for an interim injunction to ‘freeze’ the use of the defendant’s assets. As an LMAA tribunal does not have the power to grant an interim injunction or order a party to provide security (other than for costs), any such application would need to be made to the court.

As with orders for the preservation of property, an application for a freezing injunction can be made under section 44 without the permission of the tribunal or the agreement of the other party where it is a matter of urgency and it is necessary for the preservation of assets. Although the applicant will need to show that there are good reasons for making an *ex parte* application, a “real risk” that assets will be dissipated will usually suffice⁶. Otherwise, the applicant will need the permission of the tribunal or the agreement of the other party.

In *U&M Mining Zambia Ltd v Konkola Copper Mines Plc*,⁷ the applicant applied for a continuation of a world-wide freezing order (“WFO”) against the defendant’s assets to ensure the enforceability of an award of a London tribunal. Mr Justice Teare granted the continuation of the WFO, notwithstanding that both parties and the defendant’s assets were based in Zambia, on the basis that the court had jurisdiction because a WFO operates *in personam* and simply preserves the status quo until enforcement takes place. That the claimant could have applied to the Zambian courts for the same order did not preclude the English courts also having jurisdiction. In *obiter* comments, Mr Justice Teare expressed the view that section 44 also applies after an award has been issued but, considered that in any event, the court has jurisdiction to order an injunction in such circumstances under section 37 of the Senior Courts Act 1981.⁸

Although the court has power, under section 2(3) of the AA 1996, to grant a freezing injunction where the arbitration is seated outside England, it is unlikely to do so without a clear connection to the UK.⁹ A party’s nationality will not be sufficient,¹⁰ but residence in or a presence of assets in the UK may suffice.¹¹

III. Orders for attendance of witnesses

The parties may also seek the assistance of the court under sections 43 and 44(2)(a) to compel an uncooperative witness to attend and/or provide evidence.

Section 38(5) of the AA 1996 provides that “*the tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation*”. However, the tribunal can only make such a direction if the witness is a party to the arbitration, which is not often the case, and the tribunal has limited means of enforcing the direction.

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Under section 43, a party may also apply to the court for an order securing the attendance of a witness, so long as they have the permission of the tribunal or agreement of the other party and the witness is in the UK. Further, in *A & Anr v C & Ors*,¹² the Court of Appeal held that the courts may make an order under section 2(3) and section 44(2)(a) for the taking of witness evidence by deposition, regardless of whether the witness is a party to the arbitration or the arbitration is seated outside of the UK. In *A & Anr v C & Ors*, the seat of arbitration was New York and the witness, who was not a party to the proceedings but was resident in England, was refusing to provide evidence. Lord Justice Flaux held that based on the wording of sections 2(3) and 44(2)(a) *"there is simply no justification in the language of the Act for limiting the application of the subsection to domestic arbitrations"*.

IV. Orders against third parties

Whilst the Court of Appeal in *A & Anr v C & Ors* held that an order for the taking of evidence of a third party could be made under section 44(2)(a), it declined to consider whether the courts' powers under section 44 extend to the making of orders against third parties in general.

This issue has been the cause of some uncertainty since *obiter* comments in *Cruz City 1 Mauritius Holdings v Unitech Ltd & Ors*¹³ that orders under section 44 cannot be made against non-parties, notwithstanding the decision in *Assimina Maritime Ltd v Pakistan Shipping Corporation (The "Tasman Spirit")*,¹⁴ where a third-party surveyor based in the UK was ordered to produce a survey report which was relevant to the arbitration. *DTEK Trading SA v Mr Sergey Morozov & Anr*¹⁵ followed *Cruz City* and the court declined to make an order to preserve a settlement agreement between two third parties resident outside of England under section 44(2), distinguishing *The Tasman Spirit* on the basis that in that case an application for a witness summons under section 43 had been made in conjunction with an application under section 44.

Both *Cruz City* and *DTEK* involved third parties resident outside of the UK and the court should still be able to make orders against third parties within the UK under the court's *in personam* jurisdiction.¹⁶ However, *Cruz City* and *DTEK* have been criticised for creating a *"lacuna whereby a non-party can take steps to seek to thwart the arbitration agreement"*¹⁷ and this issue would benefit from further consideration by the courts.

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V. Conclusion

Section 44 of the AA 1996, and the judgments on the section, reflect the tension between the role of the court in supporting the proper functioning of the arbitral process and the role of the tribunal to decide all procedural and evidential matters. Whilst there are a number of issues which are yet to be resolved by the courts, the benefit of section 44 is that it limits the ability of one party to frustrate the arbitral process by drawing the other into expensive and time consuming litigation after having agreed that any dispute will be referred to arbitration, whilst also providing the parties with access to relief that fall outside of the tribunal's powers.

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- [1] Section 2(3) AA 1996
- [2] Merkin and Flannery on The Arbitration Act 1996 (6th Ed) at 44.1
- [3] The Second Schedule, paragraph 14.
- [4] *Three Shipping Ltd v Hareball Shipping Ltd* [2005] 1 All E.R. (Comm) 200.
- [5] [2005] EWCA Civ 618
- [6] *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG* (The Niedersachsen) [1983] 2 Lloyd's Rep. 600, *Congentra v Sixteen Thirteen Marine* [2008] 2 CLC 51
- [7] [2014] EWHC 3250 (Comm)
- [8] Whilst this issue remains unsettled by the courts, Teare J's comments are supported by Merkin and Flannery on The Arbitration Act 1996 (6th Ed)
- [9] *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm)
- [10] *Petrochemical Logistics Ltd & Anr v PSB Alpha AG & Anr* [2020] EWHC 975 (Comm)
- [11] *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*
- [12] [2020] EWCA Civ 409
- [13] [2014] EWHC 3704 (Comm)
- [14] [2004] EWHC 3005 (Comm)
- [15] [2017] EWHC 94 (Comm)
- [16] Merkin at 44.7.5
- [17] *DTEK*

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