



# DECISIONS, DECISIONS

International Arbitration and Dispute Resolution Newsletter

June 2006  
Quarterly Newsletter

## IN THIS ISSUE



**HELPING HERCULES: JUDICIAL ASSISTANTS IN THE COURT OF APPEAL**

by Robert Blackett .... P. 1



**TIME, COSTS AND OTHER HEADACHES: IS ARBITRATION LOSING ITS EDGE?**

by Melanie Willems &

Gregor Kleinknecht ... P. 3

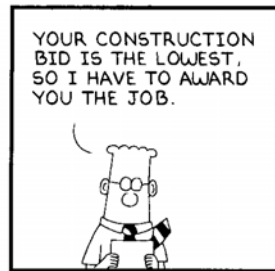


**COURT INJUNCTIVE RELIEF IN SUPPORT OF**

**ARBITRATION PROCEEDINGS: A HEALTHY BALANCE?**  
by Zoë Bent ..... P. 7

## ALSO FEATURED

Meet the Team ..... P. 11



## HELPING HERCULES: JUDICIAL ASSISTANTS IN THE COURT OF APPEAL

by Robert Blackett

In the United States there is a long established practice whereby law school graduates may be appointed 'clerks' to Federal judges. The system dates to 1875 when the newly appointed Chief Justice of the Massachusetts Supreme Court hired Harvard graduates to help with his increased workload. The practice has become an institution, with Federal judges at all levels entitled to appoint clerks. Competition for the role of Supreme Court clerk is particularly fierce. Following a quick survey of America's legal elite, it is obvious why the role is so coveted. Partners in leading US firms give clerkships pride of place in their resumé's. America's most distinguished legal academics have also acted as clerks, and many current Federal judges were once clerks to their predecessors.



Officially, Supreme Court clerks have the job of writing memoranda on 'petitions of *certiorari*'. These are written applications for permission to appeal to the Supreme Court. Of the thousands of petitions made each year, a hundred or so will be heard and these are selected largely on the basis of the clerks' memoranda. While this may not seem overly exciting, it has not prevented clerks becoming fairly ubiquitous characters in legal thrillers. The job, it seems, does not just enhance career prospects but also provides excellent chances for romance, heroism or dying an untimely and mysterious death. The role is a staple of non-fiction too, and various former clerks have written scandalous autobiographies, portraying themselves as exercising considerable power and manipulating judges they were supposed to serve. There has, consequently, been public debate, primarily about the secretive appointment process and the lack of diversity among clerks, but also as to whether there is a legitimate role for clerks at all.

Officially, Supreme Court clerks have the job of writing memoranda on 'petitions of *certiorari*'. These are written applications for permission to appeal to the Supreme Court. Of the thousands of petitions made each year, a hundred or so will be heard and these are selected largely on the basis of the clerks' memoranda. While this may not seem overly exciting, it has not prevented clerks becoming fairly ubiquitous characters in legal thrillers. The job, it seems, does not just enhance career prospects but also provides excellent chances for romance, heroism or dying an untimely and mysterious death. The role is a staple of non-fiction too, and various former clerks have written scandalous autobiographies, portraying themselves as exercising considerable power and manipulating judges they were supposed to serve. There has, consequently, been public debate, primarily about the secretive appointment process and the lack of diversity among clerks, but also as to whether there is a legitimate role for clerks at all.

### Creation of the JA Role

In 1997, at the instigation of Lord Justice Otton, the Court of Appeal for England & Wales (Civil Division) first appointed a small number of part-time 'judicial assistants' ('JAs'). The role was loosely based on that of US Supreme Court clerks. The practice has continued and, at any one time, there may be up to ten such JAs working in the Court of Appeal, each assigned to one of the thirty or so Court of Appeal judges. This is rather different to the US, where I understand each Supreme Court Justice is entitled to four clerks, Circuit Court judges to three and District Court judges to two! Competition for the positions is not yet like that in the US, though the Court of Appeal now receives over 100 applications for a maximum of ten places.

While JAs do a variety of work depending on the needs of their particular judges, there is also a common pool of work. Each will be given copies of papers filed by a litigant in person seeking permission to appeal, and will write a 'Bench Memorandum' ('BM'), summarising the case and expressing a view as to whether permission should be granted. In 2005 the Court of Appeal received a total of 2541 applications for permission to appeal. Applicants are (unlike in the US system) entitled to an oral hearing of this application. Around 40% of all applications for permission to appeal are made by litigants in person, of whom perhaps one in ten can demonstrate that they have arguable grounds.

The typical litigant in person files an unpaginated, unbound pile of papers which, at first glance, appears entirely random. Accompanying this there will be a forty page close-typed skeleton argument, and a forty page close typed grounds of appeal. All too often these are rambling, repetitive diatribes. Litigants in person typically claim astronomical damages and they are not slow to allege that their lack of success at first instance was the result of an elaborate conspiracy, bad faith, bias and/or fraud. An allegation that the opposition used some form of mind control is only slightly less common.

### My Experience

In 2006 I was appointed JA to Sir Anthony Clarke, the Master of the Rolls and England's third most senior judge. I was able to spend a

little over three months with 'the MR' before my move to Howrey. Preparing BMs was, for me, a mixed experience. Reading the papers was often remarkably tedious. At the same time, I worried constantly that I might miss something in a deserving case. This was tempered by the satisfaction which came from understanding the appeal, and reducing the whole heaving pile to a two page summary. There was also a certain novelty in finding out about areas of law like employment, immigration, social security, bankruptcy, defamation and so on, which I would otherwise never come across. My real dream was to find a case where there was, in fact, an arguable appeal, but this was never realised.

Work JAs do for their individual judges is usually far more interesting. I was lucky in that, compared to the other JAs judges, the MR was prepared to give me quite a lot to do on his cases. During my time with the MR, his cases included: *Ashley*, a claim for misfeasance in public office arising from the police shooting a naked, unarmed man; the *Rogers v Swindon* judicial review action, seeking to compel an NHS trust to pay for the breast cancer drug, 'Herceptin'; *A v Hoare*, a set of joined appeals concerning the application of limitation periods to civil claims for sexual assault, which included a claim against a rapist who had won the lottery; and a claim by the anti-war protestor Brian Haw, seeking a declaration that he was not caught by the provisions of a 2005 Act regulating demonstrations in Parliament Square.

I would typically be given one or two sets of papers by the MR last thing on a Friday. I would then prepare an opinion on the case and, the following Thursday or Friday, would meet with the MR to explain what the case was about, and set out my view on the merits. The MR would take my opinion and relevant documents to read over the weekend, ready to hear the appeal on the Monday. Before the hearing, judges meet to discuss their views on the case, and I was able to attend these meetings. Depending on how interesting I thought the case was, and who was acting as Counsel, I would often sit in on the hearing.

The real insight came after seeing the public part of the proceedings, going 'back stage' to hear the Court's opinions on Counsel and their arguments. This is rather different to the

American system, where clerks are actually forbidden from attending post-hearing conferences between judges. In more substantial cases, the MR and I would discuss the case further during breaks in the hearing, or in the days and weeks which followed, while the judgment was being written. In most cases, one judge will write a judgment representing the view of all the judges. Often a number of drafts and comments on these drafts will pass back and forth as a consensus is sought and, where the MR was writing the lead judgment, I would be asked to read and comment on these too.

I was fortunate in that a number of judges, besides the MR, felt able to give me work. For example, while I was a JA a number of issues had arisen with respect to interviewing of jurors, filming in Court, and so on, in correspondence between the media and Court officials. These were referred to the President of the Queen's Bench Division, for whom I wrote a series of opinions on the arguments raised by the programme makers' lawyers. I also wrote and researched speeches for various judges, prepared synopses of recent ECJ and ECtHR decisions for circulation among the judiciary and wrote headnotes for lengthy Court of Appeal decisions.

The Court of Appeal is, I am told, one of the busiest appellate Courts in the world, in terms of the sheer number of appeals.

to hear cases on any issue, far removed from what they saw in practice or as first instance judges in specialist Courts. I spent a great deal of my time reading up on unfamiliar areas in order to identify and explain relevant points. Even cases where I was familiar with the law - arbitration appeals, commercial cases and questions of private international law for example - were still very time consuming. I would have a week to explain an appeal arising from a complex dispute which had occupied the parties' lawyers for years.

The short time I was able to spend in the Court of Appeal left me genuinely impressed by how industrious and conscientious its judges are, and how carefully they consider each case and each argument. The legal academic, Ronald Dworkin, uses the example of 'Hercules', a perfect judge who is improbably meticulous and hard working, to explain his theory of how the common law works. Dworkin was, formerly, clerk to the US Court of Appeals judge, Learned Hand. If his experience of clerkship was anything like my experience as a JA, I can well understand where the idea of Hercules may have come from.

---

## TIME, COSTS AND OTHER HEADACHES: IS ARBITRATION LOSING ITS EDGE?

by Melanie Willems & Gregor Kleinknecht



A speedier dispute resolution process and lower costs are usually cited as key advantages of arbitration over litigation in resolving complex international commercial disputes. Equally regularly, the question is asked as to whether this actually remains true or whether it is wishful thinking fuelled by self interest.

Court of Appeal judges work quickly, hearing one or two appeals a week during term time. Alongside this volume, there is an unmatched variety. Judges in the Court of Appeal may have

Since the introduction of the Civil Procedure Rules and the consequential reforms of the civil justice system in England, litigation has undergone some transformation:

- while the CPR may not have had the desired effect of reducing the costs of litigation (and anecdotal evidence suggests quite the contrary, due to heavy front-loading of the process), litigation in the High Court - from the date of issue of a claim form through to judgment - is now quicker, even in complex high value cases;
- interlocutory hearings can be arranged in a matter of days;
- some judges (perhaps not all?) have become adept at making judicious use of their case management powers;

- Court fees remain low compared to the fees of arbitral institutions and include the use of Court facilities and judges' time;
- at least in the European context, the recognition and enforcement of judgments abroad functions just as well as that of arbitration awards under the New York Convention;
- after much procrastination and indecision, the new facilities for the Commercial Court in London, which has always enjoyed an excellent reputation internationally, are now finally edging closer to becoming reality; and
- among sophisticated parties, mediation is now often the dispute resolution mechanism of choice for resolving commercial disputes at an early stage.

Where has this left arbitration? Any party, lawyer, or arbitrator who has been involved in complex international arbitration proceedings will have war stories to tell of the process becoming bogged down, and of proceedings running on far too long, while costs continue to rack up, even where parties generally co-operate in procedural matters and none of the parties deliberately sets out for strategic reasons or otherwise to undermine the process. Are these exceptional cases, true to the motto that no news is good news, and that only bad news makes the headlines, or is there real cause for concern and a more fundamental problem? If there is a problem, what are the causes and what can be done about it?

While it is no doubt true to say that many (if not most) international arbitration proceedings are resolved speedily, efficiently and fairly, concerns about costs and delay in complex arbitration proceedings appeared to be real enough for the ICC Commission on Arbitration to appoint a Task Force with a mandate *"to identify ways in which time and costs in international arbitration and, in particular, in complex ICC arbitration cases, can be reduced"*. This obviously assumes a perceived need for time and costs to be reduced - although this need is by no means specific to the ICC. Pierre Lalive, one of the leading Swiss arbitrators, came to much the same conclusion in two reflective articles on the state of arbitration, recently published in the Swiss Arbitration

Association Bulletin, and was not sparing with scathing criticism of parties, lawyers, arbitrators and institutions<sup>1</sup>.

When we reviewed our own recent experiences as arbitration Counsel, and spoke to our clients about their experiences with complex arbitrations, the following picture emerged as to key factors that cause delay and lead to increased costs:

- unavailability of arbitrators (in particular, if the panel comprises three arbitrators) and Counsel for hearings;
- tactical challenges of tribunal members and other interlocutory applications on unmeritorious grounds;
- lack of proactive case management and lack of control of inappropriate conduct by the parties and their representatives through the tribunal;
- unjustified extensions of time for compliance with procedural steps;
- lack of control over discovery;
- procedural duplication through adoption of both civil law and common law procedures (e.g., extensive written submissions plus a long oral hearing, or written witness statements plus lengthy examination of witnesses in chief);
- delay by the tribunal in drawing up the arbitral award; and
- lack of overall control of the arbitrators, process and progress by arbitral institutions.

Interestingly, but not surprisingly, there is a common view that the factors that lead to delay will also more or less invariably lead to increased costs. It seems clear enough that the longer the proceedings, the more expensive they are likely to be.

The largest proportion of costs of any arbitration proceedings will be the costs of legal representation, that is the parties' lawyers' fees, rather than the fees of the arbitral institution or of the arbitrators. This is a truism and hardly a

---

<sup>1</sup> Pierre Lalive, *Dérives arbitrales (I) and (II)*, Bulletin ASA, volume 23, No.4/2005, pages 587-592, and volume 24, No.1/2006, pages 2-12, both in the French language

scoop, because the party representatives will be doing the bulk of the work in any arbitration proceedings, and will also often manage experts' fees and other disbursements. However, the principal interest of any lawyer who hopes to be instructed again by the same client will be to obtain a speedy and fair resolution of the dispute for their client and not to rack up the highest possible fees. While there will always be cases in which uncooperative defendants will deliberately seek to slow down and obstruct the process, delay and excessive costs are mostly the direct or indirect result of procedural measures ordered by the arbitral tribunal, or of a failure by the arbitral tribunal effectively to control the proceedings.

All recognised modern institutional arbitration rules and, indeed, the national arbitration laws of the countries most frequently chosen as seats for international arbitral proceedings, such as England, Switzerland, or France, all make adequate provision for the proper and efficient conduct of arbitral proceedings, and equip arbitrators with the necessary procedural powers, supported by Court assistance, where required. By way of example, in the ICC Rules of Arbitration, see Article 15(1):

*“The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.”*

and Article 20:

*“The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.”*

Any issues of excessive costs or delay that arise are therefore likely to be a result of those rules not being used and applied to their full and best effect.

Credit must be due to the ICC for taking the bull by the horns in identifying and seeking to address the dual issues of costs and delay, and the recommendations of its Task Force will no

doubt be awaited with interest across the international arbitration community. In practice, the parties, their lawyers, arbitrators, and institutions must all play a role and accept their share of the responsibility for avoiding unnecessary costs and delay and for ensuring that arbitration remains the preferred process for resolving international commercial disputes.

For example, parties and their representatives should:

- avoid appointing arbitrators who are too busy and unwilling or unable to give their appointment strict priority over other professional obligations, or who are known to over-book, and by instead appointing arbitrators from a wider pool of candidates;
- seek clear and specific procedural directions and a firm timetable at the outset of the proceedings;
- not simply seek to replicate their domestic Court procedures but use the flexibility of arbitration to agree procedures that address the specific issues in dispute between the parties in the most appropriate manner;
- where appropriate, agree with their opponent the applicability of supplemental rules, such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which promote efficient and cost-effective procedures;
- consider the use of telephone or VCU hearings for interlocutory matters;
- avoid unnecessary and repetitive filings and submissions;
- provide the tribunal with agreed reading lists to facilitate management of the case documentation; and
- consider whether mediation may provide a better means of resolving the dispute.

Within the parameters set by the applicable arbitration rules and other applicable procedural rules, arbitrators should:

- be upfront with arbitral institutions and nominating/appointing parties about other engagements which may affect their ability to deal with the arbitration speedily and efficiently;

- not accept an appointment unless they are reasonably certain that their other engagements will not adversely affect the proper conduct of the proceedings;
- familiarise themselves with the substance of the case and with the parties' submissions as and when they are filed so as to be able to identify procedural and substantive issues at an early stage;
- consider scheduling an early case management hearing with the parties in attendance;
- conduct the proceedings proactively, and give fair and effective case management directions;
- be prepared to make fair but firm decisions to deal with parties who seek to obstruct the process or otherwise behave in an inappropriate manner;
- exercise stricter control over time limits;
- exercise control over the discovery process by defining the types and categories of documents which must be disclosed;
- cap the number and length of written party submissions;
- avoid tribunal appointed experts, limit the number of experts per party, and define their field of expertise;
- prepare for each hearing and familiarise themselves in advance with the issues to be determined;
- adopt a strictly enforced "chess clock" procedure for party submissions at hearings;
- consider penalising inappropriate or bad faith conduct and frivolous applications/arguments by the parties in their decision as to costs; and
- draw up the award immediately following the closure of the proceedings, which will not only ensure that the parties' legitimate expectations are met, but will also be likely to improve the quality and reasoning of the award.
- seek specific information from arbitrators as to their availability in advance of an appointment being made or nomination confirmed;
- ask arbitrators to submit diaries for the next 18 months and to identify apparent diary clashes prior to appointment;
- have recourse to a wider base of potential arbitrators when making appointments to ensure that overbooking by arbitrators is minimised;
- monitor the progress of arbitral proceedings more closely, investigate causes for delay, and use powers which they are given under the rules to ensure that the proceedings are progressing speedily and efficiently;
- exercise control over the time table and require specific justification for extending procedural deadlines under the applicable rules, such as the six month time limit for rendering an award under Article 24 of the ICC Rules of Arbitration;
- deal robustly with challenges to arbitrators, having regard to internationally recognised standards and principles on impartiality and independence;
- ensure that awards are drawn-up and published as soon as possible following the conclusion of the proceedings;
- ensure that arbitrators are compensated by way of stage payments for the work they undertake as the proceedings develop (and are thus encouraged to take a pro-active role);
- reduce the arbitrators' fees if the tribunal unduly delays the proceedings or the award;
- ensure that their fee structures remain competitive and represent a true reflection of the value of services rendered by the institution and the arbitrator; and
- operate transparently, remain open to change and reform, and serve their users' interests above those of their officials and panel arbitrators.

Finally, where arbitral institutions have the required powers under their statutes, they should:

International commercial arbitration has demonstrated the capacity to renew and improve itself, as shown, *inter alia*, by the recent publication of the IBA Guidelines on Conflicts

of Interest in International Arbitration, the notable rise in investment treaty arbitrations, and the ongoing work on updating the UNCITRAL Model Law. The work of the ICC Task Force provides an ideal opportunity to identify and address causes of excessive costs and delays, and to provide parties Counsel, and arbitrators with recommendations and guidelines that are appropriate to avoid user dissatisfaction and ensure that arbitration will continue to be the dispute resolution mechanism of choice for resolving complex international commercial disputes.

It is then for the international business and legal community to safeguard the integrity and promote the continued proper functioning of the system – in its own well understood interest. So the answer to the title question is: arbitration’s edge will be preserved, if arbitration keeps itself sharp.

## COURT INJUNCTIVE RELIEF IN SUPPORT OF ARBITRATION PROCEEDINGS: A HEALTHY BALANCE?

by Zoë Bent



Whilst arbitration tribunals often have the jurisdiction to grant injunctive relief, relief granted by a Court may be preferable (or necessary): for example, where the arbitration panel is not yet constituted and the relief is required as a matter of urgency, or where a party may wish to invoke sanctions with greater immediate bite – since the ultimate sanction for contempt of a Court order is committal proceedings.

The availability of injunctive relief from the English Courts, including in relation to worldwide assets, is nothing new in the UK<sup>2</sup>. Injunctive relief may be granted by the Court under its inherent jurisdiction, as enshrined in section 37(1) of the Supreme Court Act 1981 (the “SCA”), which provides that: *“the High Court may by order ...grant an injunction in all cases in which it appear to the court to be just and convenient to do so”*.

There are specific statutory measures for injunctions to be applied for in aid of arbitrations, under section 44 of the Arbitration Act 1996 (the “1996 Act”). Section 44 sets out the Court’s power to make any order it could

otherwise make in support of arbitration proceedings (including interim injunctions). The 1996 Act also lays down a distinction based on whether there is urgency. Where there is no urgency, the Court can only act with the permission of the arbitral tribunal, or with the agreement of the parties:

*“(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 purpose 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.”*

In all cases, the Court’s powers under section 44 of the 1996 Act are limited to circumstances where the arbitral tribunal has no power to act, or cannot act effectively (see sections 44 (5)) – it is not the Court’s function to usurp the role of the arbitrator.

### UK Domestic Arbitrations

There have been a number of decisions regarding the grant of injunctive relief by the English Courts in aid of domestic arbitration

<sup>2</sup> See: *Mercedes Benz v Leiduck*; *Siskina v. Distos Compania Naviera S.A.* [1979] A.C. 210.

proceedings.<sup>3</sup> We thought we would look at two recent cases, *Hiscox Underwriting Ltd and another v Dickson Manchester & Co Ltd*<sup>4</sup> and *Cetelem SA v Roust Holding Ltd*<sup>5</sup>. In short, the Judge in *Hiscox* adopted a wide interpretation of the Court's powers, which the Court of Appeal in *Cetelem* did not agree with. After *Cetelem*, urgent injunctive relief (for instance, in support of arbitration proceedings where the tribunal is not yet constituted) can no longer extend beyond measures aimed at the preservation of evidence or assets.

### *Hiscox*

In *Hiscox* the Court granted a mandatory injunction in support of arbitration proceedings that had been commenced, but where the tribunal could not yet act because it was not yet constituted. The facts were as follows. The Court heard an application by Hiscox ("H") that Dickson Manchester ("DM") allow H access to certain documents held by DM. H had appointed DM to write insurance business on behalf of H under a binding authority agreement – the agreement provided for disputes to be referred to arbitration. Ownership in DM changed, and a dispute between H and DM arose.

When H sought access to records held by DM which would allow H to offer renewal terms directly to the insureds (bypassing DM), DM refused and made counter-allegations that H was seeking to compete with DM unlawfully. There was evidence before the Court (which the Judge accepted) that due to many renewals being imminent, H stood to lose about £25,000 per day (£500,000 per month) in premiums if H could not get the information needed to effectively contact their insureds<sup>6</sup>.

By 26 February 2004, H had given notice of arbitration under the binding authority agreement, proposing an arbitrator to DM. The

arbitration clause provided for appointment of an arbitrator within 14 days. By 4 March 2004, DM had not responded substantively to H's nominated arbitrator (their solicitors had written to say that they were "considering" the proposal and would respond within the 14 day time limit), so H went to the Court to for an injunction requiring DM to give H access to the relevant records, which would allow H to quote directly to the insureds. An arbitrator had, however, been appointed when the matter was heard by Cooke J on 5 March 2004.

Cooke J considered a jurisdictional objection by DM on the basis of section 44(3) of the 1996 Act – in this case, neither the tribunal nor DM had consented to H's application, which could therefore only be made under section 44(3). In the 1996 Act, section 44(3) follows the section setting out the general powers of the Court to make any order it could otherwise make in support of arbitration proceedings (section 44(2)(e) specifically mentioning an interim injunction). DM argued that section 44(3) qualified the kind of injunction which the Court could grant in a case of urgency.

Cooke J rejected DM's argument as an unduly restrictive interpretation of the 1996 Act. Regarding the meaning of section 44(3), the Court concluded that it was permissive (due to the use of the word "*may*") and gave the Court a power in addition to section 44(2)(e). Cooke J held (paragraph 41):

*"It is also agreed, however, that the court's general approach should be a minimalist one of intervening only within the framework of the Act or in order to support the basic process of arbitration. As I have already found that an interim injunction prior to the appointment of an arbitrator or in circumstances where an arbitrator cannot effectively act is permissible in an urgent situation, s 1(c) [of the 1996 Act] provides no bar here if the matter otherwise requires an order to be made as a matter of urgency and such an injunction would be supportive of the arbitration process."*

He found that where there had been a delay in the appointment of an arbitrator ("*albeit one*

---

<sup>3</sup> Leading authorities include which should be referred to for guidance include: *Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda* [1994] 4 All ER 507; *Hiscox Underwriting Ltd and another v Dickson Manchester & Co Ltd and another* [2004] 1 All ER (Comm) 753; *Cetelem SA v Roust Holding Ltd* [2005] 4 All ER 52.

<sup>4</sup> *Ibid* footnote 2.

<sup>5</sup> *Ibid* footnote 2.

<sup>6</sup> Paragraph 19

*within the party's rights*"- paragraph 38) the Court had the power to intervene "*where the tribunal cannot act effectively*" – at paragraph 39. The Judge also noted that since the Arbitrator had only just been appointed, he could not make any immediate orders as were required here and so could not act (at paragraph 33).

Generally, the Court accepted that it had residual jurisdiction to grant interim relief in aid of arbitration proceedings which was "*outside the framework of the 1996 Act*" by virtue of section 37(1) of the SCA 1981. Despite having given the 1996 Act a wide construction, Cooke J also noted: "*An interim injunction will not readily be granted if the effect of granting that injunction is effectively to decide the matter at issue which is to be determined by the arbitrator and if the effect of so doing would be usurp the function of the arbitrator to which the parties have agreed. This is a point of the utmost importance but it will, nonetheless, yield to the requirements of justice if urgency and fairness require it in order that justice can be administered.*"

## **Cetelem**

*Hiscox* was found to be wrong by the Court of Appeal on the interpretation of section 44(3) of the 1996 Act. The Court found that the correct interpretation of section 44(3) only permitted interim relief to be granted in cases of urgency (before the tribunal was properly constituted and could give its consent to an application to the Court), if the order was necessary for the preservation of assets or evidence.

The Court of Appeal saw some force in the construction adopted in *Hiscox*, but was eventually persuaded that section 44(3) had been intended to limit the power of the Court to intervene before a tribunal was fully constituted. That conclusion was based on the DAC Report commenting on what later became clause 44 of the 1996 Act (paragraph 215)<sup>7</sup>:

*"In order to prevent any suggestion that the Court might be used to interfere with or usurp the arbitral process, or indeed any attempt to do so, we have stipulated that except in*

*cases of urgency with regard to the preservation of assets or evidence, the Court can only act with the agreement of the parties or the permission of the tribunal. We have excepted cases of urgency, since these often arise before the tribunal has been properly constituted or when in the nature of things it cannot act quickly or effectively enough" (our emphasis)*

The Court of Appeal followed this. It held that the Courts should be careful not to usurp the arbitral process, leaving substantive questions for the arbitration panel. Having concluded the issue on the basis of the provisions of the 1996 Act, the Court of Appeal felt it unnecessary to consider the SCA. It did, however, note that this was something which would need to be examined in due course since, as the Court concluded, "*there is a tension...between the apparently wide powers conferred on the court by s37 and the much narrower powers conferred on the court by s44.*"

It is worth mentioning that in *Cetelem*, the Court clarified that section 44(3) could justify a mandatory injunction for the preservation of assets / evidence, and that "assets" included the intangible (choses in action) as well as the tangible. So after *Cetelem*, a claimant in the situation that arose in *Hiscox* might argue that a chose in action was being destroyed (or had its value reduced) by the actions of the defendants - the intangible asset requiring protection being a contractual right to have access to the documents disclosing the identity of the insureds.

## **International Arbitrations**

The question of availability of injunctive relief in aid of international arbitration proceedings is answered by the local law in which the relief is to be sought. This of course will not necessarily be the place of the seat of arbitration which the parties have elected. This potentially means that even where the curial law of the chosen jurisdiction does not allow for injunctive relief, this will not necessarily prevent such a remedy from being granted.

The position regarding the availability of Court-assisted injunctions in international arbitrations in England is less well established than in

---

<sup>7</sup> Paragraph 46 of the Judgment.

domestic matters. There have been few authorities on point. One of the few cases, *Channel Tunnel Group Ltd and Another v Balfour Beatty Construction and others Ltd*<sup>8</sup>, was appealed all the way to the House of Lords, and is therefore instructive as to the English Courts' attitude on the subject.

The claimants employed the defendants to build the Channel tunnel. The construction agreement between the parties provided that any disputes between the parties during the course of the construction work were to be referred to arbitration.

A dispute arose, as a result of which the claimants issued a writ seeking an injunction to restrain the defendants from suspending work. The matter came before the High Court in England, which granted the injunction and dismissed the defendants' summons to have the claimants' action stayed in favour of arbitration.

On appeal, the Court of Appeal overturned the decision at first instance and granted a stay of the action, finding that the party to the arbitration agreement was not entitled to disregard the arbitration procedure and bring an action in the Courts. The Court concluded that it had no jurisdiction to grant injunctive relief in aid of international arbitrations under the equivalent section of the current 1996 Act<sup>9</sup>. Furthermore, the Court's discretion under Section 37(1) SCA should not be exercised in circumstances where the arbitration agreement related to international arbitration proceedings.

The claimants appealed to the House of Lords who considered whether it had jurisdiction to grant interim relief under both the provisions of the then relevant Arbitration Act, and the SCA.

Their Lordships agreed with the Appeal Court that the arbitration legislation did not provide for injunctive relief in aid of international arbitration, having regard to Parliament's intention in the original legislative provisions.

However, the position under Section 37(1) SCA yielded a different conclusion.

Like the Court in *Cetelem*, their Lordships noted the apparent tension between the restrictive

nature of the then equivalent of the 1996 Act<sup>10</sup>, on the one hand, which required the Courts to observe the spirit of arbitration and to "*be careful not to meddle unduly in matters which properly belong to the arbiter*" and s.37(1)SCA on the other, which appeared to allow the exercise a broad scope of discretion. In conclusion, their Lordships found no reason why, in principle, the English Court should be precluded from granting interim relief in aid of international arbitration proceedings, provided that it had some form of jurisdiction over the matter. In particular, Lord Browne-Wilkinson did not consider that it would be desirable if English Courts were precluded from granting injunctive relief in circumstances where the arbitration forum was outside England:

*"Given the international nature of contemporary litigation and the need for mutual assistance between the courts of the different jurisdictions it would be a very serious matter if the English courts were unable to grant interlocutory relief in cases where the substantive trial and the ultimate decision of the case might ultimately take place in the court outside England."*

That said, Lord Mustill was at pains to point out that when faced with an application for interim relief in aid of international proceedings, the English Court should approach the making of the order with "*the utmost caution and should be prepared to act only when the balance of advantage plainly favours the grant of relief*", particularly bearing in mind that any interference by the Court was contrary to the parties' choice to refer the matter to arbitration.

### Conclusion

As a general proposition, injunctive relief is, at least in principle, available from the English Courts in aid of either domestic or international arbitration proceedings, whether of a prohibitory or mandatory nature (although the latter will be granted more cautiously). The basis for injunctive relief in international proceedings will, however, be limited to section 37(1)SCA.

One of the critical factors to bear in mind in seeking interim relief (whether the relief is

---

<sup>8</sup> [1993] AC334

<sup>9</sup> In that case, Section 12(6)(8) of the Arbitration Act 1950.

---

<sup>10</sup> Section 12(6)(h) Arbitration Act 1950

sought under the 1996 Act or under the SCA), and indeed which heavily influenced the House in *Channel Tunnel*, is that interim relief is unlikely to be granted where the relief would, in effect, pre-empt the final relief and therefore the decision of the arbitrators. It might be said that the Courts as usual are found to be careful not to unduly interfere in arbitration procedures except where it is both permitted by legislation and necessary to support the effectiveness of that process – a healthy balance.

---

**For more information, contact:**



Melanie Willems  
[WillemsM@howrey.com](mailto:WillemsM@howrey.com)  
+44 20 7936 5354

22 Tudor Street  
London EC4Y 0AY, United Kingdom  
T: +44 (0) 20 7936 5300  
F: +44 (0) 20 7936 5301

---

## MEET THE TEAM

Each quarter we will introduce one of the members of Howrey LLP's International Arbitration Group.



**GEORGE MALING**  
[malingg@howrey.com](mailto:malingg@howrey.com)

George Maling is a partner in Howrey's London office specialising in International Commercial Arbitration and Litigation. He has practised as both a Barrister and a Solicitor in several common law jurisdictions where he has handled a wide variety of dispute resolution, including in the following areas: aviation; construction; insurance; manufacturing; IT; fraud; asset freezing; insolvency; banking and commodities trading.

George has experience conducting arbitrations, mediations, trials and interlocutory hearings before the Courts of New Zealand, the Turks and Caicos Islands and England and Wales, and most major arbitration institutions (in particular, the LCIA). He is known for his wild ties.

[www.howrey.com](http://www.howrey.com)

Amsterdam Brussels Chicago East Palo Alto Houston Irvine London Los Angeles  
Northern Virginia Paris Salt Lake City San Francisco Taipei Washington DC

**DISCLAIMER:** This document is not intended as legal advice. Readers should not act upon the contained information without professional advice. No portion of this paper may be reproduced without express permission.